Supreme Court, U.S.
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No. 91-1920

In The

Supreme Court of the United States

October Term, 1991

CLAUDE T. WEIMER, For Himself; and
ASSOCIATION OF COMMONWEALTH CLAIMANTS,
An Unincorporated Association,

Petitioners,

vs.

PAUL AMEN; S.E. COPPLE; MARVIN COPPLE; COMMERCE SAVINGS COLUMBUS, INC.; FIRST SAVINGS CO.; FIRST NATIONAL BANK; NORWEST CORP.; COMMERCE GROUP, INC.; COMMERCE SAVINGS LINCOLN, INC.; PROVIDENT FEDERAL SAVINGS BANK; UNION BANK & TRUST CO.; AMERICAN STATE SAVINGS COMPANY; FEDERAL DEPOSIT INSURANCE CORPORATION; AMERICAN SECURITY BANK; COMMERCE SAVINGS SCOTTSBLUFF, INC.; KEN WELLMAN; WILLIAM BECKMAN; DOUGLAS ALFORD; ALFRED ADAMS; KENLON H. HAKE; ROY ASHCRAFT; DARRELL ANDERSON; TIM SPOENEMAN; DENIS APPELBEE; HERBERT HEUMANN,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether depositors of a failed bank have standing under the federal RICO Act (18 U.S.C. §§ 1961 - 1968) to sue for the loss of their funds deposited in the failed bank, when the injury to their property flows from fraudulent misrepresentations by an independent state-chartered deposit insurance corporation concerning the security of deposits in the failed bank.

2. Whether it is a departure from accepted and usual judicial practice, and a violation of Federal Rules of Civil Procedure:

(a) to dismiss a complaint on the ground that the plaintiff is not the real party in interest without granting to the plaintiff a reasonable opportunity to seek ratification of the complaint by the real party in interest, or to substitute or join the real party in interest; and

(b) to dismiss a complaint on the ground that it is a derivative action that should have been brought by the Receiver of a failed bank, without granting to the plaintiff leave to file an amended complaint showing that prerequisites for a derivative action have been met.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND RULES INVOLVED IN THE CASE .. 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING PETITION 8

I. A RICO PLAINTIFF HAS STANDING TO RECOVER UNDER 18 U.S.C. §1964(c) FOR INJURY TO HIS BUSINESS OR PROPERTY FLOWING FROM THE RACKETEERING ACTIVITY OF THE DEFENDANTS, WHETHER THE INJURY IS DIRECT OR INDIRECT 9

A. The Court of Appeals and the District Court Opinions Are In Conflict With United States Supreme Court Precedent 12

B. The Decision of the District Court Affirmed by the Court of Appeals is in Conflict with Other Opinions of the Eighth Circuit, and with Opinions from Other Circuits 13

II. DISMISSAL WITHOUT OPPORTUNITY TO SUBSTITUTE A NEWLY DETERMINED REAL PARTY IN INTEREST, OR OTHERWISE TO SHOW STANDING IN LIGHT OF THE COURT'S DECISION, WAS A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND CONTRARY TO FEDERAL RULES OF CIVIL PROCEDURE 15

CONCLUSION 19

APPENDIX A. Court of Appeals opinion 1-22-92 .. A-1

TABLE OF CONTENTS – Continued

Page

APPENDIX B. Court of Appeals judgment 1-22-92... B-1

APPENDIX C. District Court opinion #1 1-16-87 .. C-1

APPENDIX D. District Court order 1-22-87 ..... D-1

APPENDIX E. District Court opinion #2 8-28-87 .. E-1

APPENDIX F. District Court judgment #2 8-28-87 . F-1

APPENDIX G. District Court opinion #3 8-24-90 .. G-1

APPENDIX H. District Court judgment #3 8-24-90... H-1

APPENDIX I. Nebraska Supreme Court opinion in related case I-1

APPENDIX J. Notice of Appeal 9-24-87 ..... J-1

APPENDIX K. Court of Appeals order of remand 11-15-89..... K-1

APPENDIX L. Letter to District Court 5-21-90..... L-1

APPENDIX M. Motion for Relief 9-14-90.....M-1

APPENDIX N. Brief in Support of Motion 9-14-90 N-1

APPENDIX O. Order Denying Relief 9-28-90..... O-1

APPENDIX P. Court of Appeals Order re: supp. brief P-1

APPENDIX Q. Petition for Rehearing 2-4-92 ..... Q-1

APPENDIX R. Order denying rehearing 2-24-92... R-1

APPENDIX S. Amended Complaint 4-27-87 ..... S-1

TABLE OF AUTHORITIES

Page

CASES:

Alexander Grant & Co. vs. Tiffany Industries, Inc., 742 F.2d 408 (1984), vacated and remanded, 473 U.S. 922 (1985), on remand, 770 F.2d 717 (1985), cert. den. 474 U.S. 1058 (1986) 13

Bass vs. Campagnone, 838 F.2d 10 (1988) 14

Bigelow vs. RKO Radio Pictures, 327 U.S. 251 (1946) 14

Brandenburg vs. Seidel, 859 F.2d 1179 (1988) 14

Foman vs. Davis, 371 U.S. 178 (1962) 17

H.J. Inc. vs. Northwestern Bell Telephone Company, 492 U.S. 229 (1989) 4, 5

Majd-Pour vs. Georgianna Community Hospital, Inc., 724 F.2d 901 (11th Cir. 1984) 15

Response of Carolina, Inc. vs. Leasco Response, Inc., 537 F.2d 1307 (5th Cir. 1976) 14

Sedima, S.P.R.L. vs. Imrex Company, Inc., 473 U.S. 479 (1985) 8, 12, 14, 19

Sperber vs. Boesky, 849 F.2d 60 (1988) 14

Terre Du Lac Ass'n. Inc. vs. Terre Du Lac, Inc., 772 F.2d 467 (1985), cert. den. 475 U.S. 1082 (1986) 13

Weimer vs. Amen, 235 Neb. 287, 455 N.W.2d 145 (1990) 18

TABLE OF AUTHORITIES – Continued

Page

Zenith Radio Corp. vs. Hazeltine Research, Inc., 395 U.S. 100 (1969) 14, 17

Zervas vs. Faulkner, 861 F.2d 823 (1988) 14

RULES:

Rule 12(b)(6) of the Federal Rules of Civil Procedure 1

Rule 15(a) of the Federal Rules of Civil Procedure ..1, 17

Rule 17(a) of the Federal Rules of Civil Procedure 1, 9, 16, 17

STATUTES:

18 U.S.C. §1341 10

18 U.S.C. §1343 10

18 U.S.C. §1961 ..... 2, 4

18 U.S.C. §1962(c) 2

18 U.S.C. §1962(d) 2

18 U.S.C. §1964(c) 2, 8, 9, 12

OTHER AUTHORITIES:

3 Moore, Federal Practice ¶¶ 15.08, 15.10 (2d ed. 1948) 17

David Smith, *Civil RICO*, Matthew Bender & Co., Inc., at p. 6-68.1 14

OPINIONS BELOW

None of the opinions below are reported. The opinion of the Court of Appeals for the Eighth Circuit is set forth at App. A, *infra*. The opinions of the District Court are set forth at Appendices C, E, and G, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit (App. B, *infra*) was entered January 22, 1992. A petition for rehearing (App. Q, *infra*) was denied on February 24, 1992 (App. R, *infra*). This Court has jurisdiction in accordance with 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED IN THE CASE

1. Rule 12(b)(6) of the Federal Rules of Civil Procedure provides as follows:

   " . . . [T]he following defenses may . . . be made by motion: . . . (6) failure to state a claim upon which relief can be granted."

2. Rule 15(a) of the Federal Rules of Civil Procedure provides in relevant part as follows:

   "A party may amend the party's pleading . . . only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . . "

3. Rule 17(a) of the Federal Rules of Civil Procedure provides as follows:

"Every action shall be prosecuted in the name of the real party in interest. . . . No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

4. The RICO Act, 18 U.S.C. §§1961-1968, provides in relevant part as follows:

   A. 18 U.S.C. §1961(1)(B) defines "racketeering activity" to include:

      "any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud). . . . "

   B. 18 U.S.C. §1962(c) and (d) provide in relevant part as follows:

      "(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .

      (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

   C. 18 U.S.C. §1964(c) provides as follows:

      "Any person injured in his business or property by reason of a violation of section 1962 of this

chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

Commonwealth Savings Company of Lincoln, Nebraska was declared insolvent on November 1, 1983. Nebraska's Director of Banking was appointed Receiver for Commonwealth. App. I-6, *infra*. The Receiver has been unable to pay back deposits in full, or to pay interest on deposits, with the result that more than $58,000,000.00 remains owing to more than 7,000 depositors.

Commonwealth Savings Company deposit accounts were guarantied up to $30,000.00 each by The Nebraska Depository Institution Guaranty Corporation (NDIGC), a state chartered private corporation modeled after the Federal Deposit Insurance Corporation. The NDIGC was overwhelmed by its liability to Commonwealth depositors. NDIGC became insolvent and ceased operations. App. S-6, *infra*.

Commonwealth depositor Claude Weimer[1], together with the Association of Commonwealth Claimants (ACC)[2], filed this action March 24, 1986. The Complaint is

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[1] Weimer died in February 1991. No party has been substituted, but the action has been maintained by the co-plaintiff.

[2] ACC is an unincorporated association of 2,650 Commonwealth depositors who assigned their causes of action to ACC.

against a former Nebraska official; former directors of NDIGC; and financial institutions that employed NDIGC directors.

The gravamen of the Complaint is that the defendants violated the Racketeer Influenced and Corrupt Organizations Act (RICO)[3], in their conduct of the affairs of NDIGC. The original Complaint was dismissed on the ground that the Plaintiffs, Weimer and ACC, had failed to allege "multiple schemes" to show a pattern of racketeering activity. (See App. C, *infra*). Weimer and ACC sought and obtained leave to file an Amended Complaint (App. S, *infra*), which is the subject of this Petition. The Amended Complaint incorporates allegations about acts of the Defendants in connection with several episodes, in an effort to show a "pattern" of racketeering activity under Eighth Circuit precedents.[4] As a result, the Amended Complaint in some aspects is redundant, and in other aspects incorporates data that is extraneous to the issues raised here.

However, the Amended Complaint continues to allege a pattern of racketeering activity in the conduct of the affairs of NDIGC. The Amended Complaint also alleges direct injury to ACC's assignors in the following particulars:

1. ACC's assignors were induced to make and retain deposits in Commonwealth Savings Company at a

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[3] 18 U.S.C. §§1961-1968.

[4] This Court has since discredited the "multiple schemes" requirement of the Eighth Circuit. *H.J. Inc. vs. Northwestern Bell*, 492 U.S. 229 (1989).

time it was already financially impaired. (App. S, *infra*, pp. 6, 8);

2. The mechanisms used to induce these deposits were fraudulent misrepresentations by the defendants. (App. S, *infra*, pp. 6-8);

3. The fraudulent misrepresentations were (a) that the NDIGC could make good on deposit guaranties, and (b) that Commonwealth was qualified for NDIGC coverage, and therefore solvent. (App. S, *infra*, p. 7);

4. That ACC's assignors reasonably relied upon the false misrepresentations in making and retaining their deposits in Commonwealth Savings Company. (App. S, *infra*, p. 20);

5. That the fraudulent misrepresentations were caused to be sent in the U.S. Mail and by wire across state boundaries, contrary to 18 U.S.C. §§1341 and 1343. (App. S, *infra*, pp. 6, 7, 8, 9, 24, and 25); and

6. That as a consequence of being misled to make and maintain deposits in Commonwealth Savings Company, ACC's assignors lost $58,000,000.00 when Commonwealth Savings Company was closed and its insolvency finally revealed. (App. S, *infra*, p. 24).

The Amended Complaint was again dismissed for failure to allege "multiple schemes", on August 28, 1987. (App. E, *infra*). On September 24, 1987, the Plaintiffs appealed this ruling to the United States Court of Appeals for the Eighth Circuit, invoking appellate jurisdiction under 28 U.S.C. §1291. (App. J, *infra*).

On November 15, 1989, the Court of Appeals remanded the action for reconsideration of the District Court's findings about the pattern of racketeering activity, in light of *H.J. Inc. vs. Northwestern Bell Telephone*

Company, 492 U.S. 229 (1989). The District Court was directed to certify its new findings back to the Court of Appeals. (App. K, *infra*).

On August 24, 1990, the District Court dismissed the Amended Complaint again, but did not address the question whether a pattern of racketeering injury had been alleged. Instead, the Court allowed the Defendants to file new Motions to Dismiss, and premised its dismissal on the following grounds:

> " '[A] plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.' *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). The question therefore becomes whether Weimer and the class of depositors he seeks to represent have suffered an individual injury distinct from any injury to the corporation so as to provide them with standing to maintain a non-derivative RICO action. *Crocker v. FDIC*, 826 F.2d 347 (5th Cir. 1987), cert. denied, 485 U.S. 905 (1988). 'An individual indirectly injured by a RICO violation cannot maintain a RICO action in his or her own name, since his or her claims are derivative of the directly injured parties' claims; "an indirectly injured party should look to the recovery of the directly injured party, not to the wrongdoer, for relief." ' *In re Sunrise Sec. Litigation*, 108 Bankr, 471 (E.D.Pa. 1989) (quoting *Carter v. Berger*, 777 F.2d 1173, 1176 (7th Cir. 1985)).
>
> * * *
>
> An individual depositor may bring a derivative action to recover for wrongs against the Bank or thrift which have indirectly injured the

> plaintiff and other depositors 'but only after having made an unsuccessful demand on the bank or its receiver to bring suit.' *In re Sunrise Sec. Litigation, supra* (citing *In re Longhorn Securities Litigation, supra*). In the present action, plaintiffs do not allege an unsuccessful demand on the receiver to bring suit.
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> * * *
>
> As it appears beyond doubt that plaintiffs cannot prove they have suffered an individual injury distinct from any injury to Commonwealth, they lack standing to maintain this action, and defendants' amended motions to dismiss should be sustained. The receiver is the only party with standing to maintain the present action. As plaintiffs lack standing, the Court need not address the remaining arguments advanced by defendants in their amended motion to dismiss." (See App. G, *infra*, pp. 4-7).

On January 22, 1992, the Court of Appeals for the Eighth Circuit in a *per curiam* opinion affirmed the District Court's dismissal as follows:

> "We have now considered the parties arguments, and conclude that the district court did not err in holding that Weimer and the class he seeks to represent have no standing to maintain this RICO action. We affirm on the basis of the district court's carefully reasoned order. *See also In re Sunrise Securities Litigation*, 916 F.2d 874, 879-89 (3d Cir. 1990)." (See App. A, *infra*).

ACC filed a Petition for Rehearing on February 4, 1992, (App. Q, *infra*), but rehearing was denied on February 24, 1992, (App. R, *infra*).

ACC now petitions this Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in accordance with Rule 12 of the Rules of this Court, and 28 U.S.C. §1254(1).

REASONS FOR GRANTING THE PETITION

The federal legal question presented in this case is one of standing to maintain a RICO action, an issue seemingly resolved some seven years ago, but which nevertheless continues to divide the circuits.

In *Sedima, S.P.R.L. vs. Imrex Company, Inc.*, 105 S.Ct. 3275 (1985), this Court set forth straightforward guidelines for the lower courts to use in assessing the standing of a plaintiff to maintain a RICO suit, as follows:

> "If the defendant engages in a pattern of racketeering activity . . . and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under §1964(c)."

The Court of Appeals and the District Court have denied standing to ACC in conflict with the teaching of *Sedima*, as amplified at Argument I., *infra*. Moreover, there is an almost even division in the circuits as to whether §1964(c) allows recovery for indirect injuries, as distinguished from direct injuries, and this dichotomy is called into question by the decisions of the District Court and the Court of Appeals, as shown at Argument I., *infra*. In addition, the Court of Appeals has permitted the District Court to depart from the accepted and usual course of judicial proceedings by foreclosing further amendment

of the complaint and by transgressing the policies expressed in Rules 15 and 17 of the Federal Rules of Civil Procedure, (See Argument II., *infra*).

As a consequence, the claims of several thousand people to recover several million dollars for injury to their property are terminated at the pleading stage, without further recourse due to operation of statutes of limitations.

This petition is filed because there is no other way to correct a grave error of the District Court that was continued by the Court of Appeals, and no other way to avert manifest injustice.

I.

A RICO PLAINTIFF HAS STANDING TO RECOVER UNDER 18 U.S.C. §1964(c) FOR INJURY TO HIS BUSINESS OR PROPERTY FLOWING FROM THE RACKETEERING ACTIVITY OF THE DEFENDANTS, WHETHER THE INJURY IS DIRECT OR INDIRECT.

The fundamental error that taints the opinion and order of the District Court is in its perception of the nature of the lawsuit. In his opinion (App. G, *infra*, p. 5), Judge Strom makes it clear that he sees this lawsuit as merely "a derivative action to recover for wrongs against the bank . . . which have indirectly injured the plaintiff and other depositors. . . . "

This perception emasculates the Amended Complaint which in fact alleges actionable mail and wire fraud by

the defendants.[5] The Amended Complaint alleges "racketeering activity" (mail fraud and wire fraud under 18 U.S.C. §§1341 and 1343) by the Defendants in their conduct of the affairs of the NDIGC and the State Banking Department. There is no allegation that the predicate acts of mail fraud and wire fraud caused any injury to Commonwealth Savings Company, or that *these* predicate acts had anything to do with the "management" of Commonwealth Savings Company. It appears that the District Court simply misapprehended the nature of the Amended Complaint, because the fraudulent representations alleged to have been sent by mail and interstate wire communication were as follows:

> (a) representations that NDIGC deposit account guaranties were sound, and that deposits in insured accounts would be secure up to the guarantied amounts. (App. S, *infra*, pp. 6, 8, 24, and 25); and
>
> (b) implied representations that Commonwealth Savings Company was solvent, although the Defendants knew it was not. (App. S, *infra*, pp. 7, 24, and 25).

It is alleged that in reliance upon these fraudulent misrepresentations caused by the Defendants to be sent

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[5] Two named defendants, S.E. Copple and Marvin Copple, were officers and directors of Commonwealth Savings Co. and also were NDIGC directors. The Amended Complaint alleges that thefts by the Copples caused the insolvency of Commonwealth. App. S, *infra*, p. 21, ¶8H. However, these alleged thefts causing Commonwealth's insolvency are not the gist of the Amended Complaint.

by mail and interstate wire communications, ACC's assignors were induced to make and keep their deposits in Commonwealth Savings Company, which was already in fact insolvent. (App. S, *infra*, p. 20).

Finally, it is alleged that ACC's assignors lost the value of their deposits when Commonwealth's insolvency was officially declared on November 1, 1983. (App. S, *infra*, p. 24). The closing of Commonwealth Savings Company was part of the chain of events leading to injury to the property of ACC's assignors, but it must be said that this injury was a foreseeable consequence of the racketeering activity. Therefore, there is a causal nexus between the racketeering activities and the injury to the property of ACC's assignors.

In summary, the injury to Commonwealth by two tort-feasors resulted in Commonwealth's insolvency, and therefore was one proximate cause of the injury to the property of Commonwealth's depositors. But for the insolvency of Commonwealth, the property of depositors would not have been injured. However, there were also fraudulent misrepresentations by other tort-feasors to induce deposits in Commonwealth when it was already unsound. These misrepresentations did *not* cause the insolvency, nor did the tort-feasors who made the misrepresentations injure Commonwealth. These misrepresentations were a second proximate cause of the injury to the property of Commonwealth's depositors. But for making and keeping deposits in Commonwealth Savings Company or induced by the misrepresentations, the property of the depositors would not have been injured by Commonwealth's insolvency.

The subject of this Petition for Writ of Certiorari is the second proximate cause of injury to the property of ACC's assignors, which second proximate cause was the racketeering activity of the other tort-feasors. Recovery of damages in this instance would not be for the benefit of Commonwealth, which was not injured by the misrepresentations, but instead would be for the depositors whose property was injured as a proximate result of the mail fraud and wire fraud racketeering activity. The Amended Complaint therefore alleges an injury "flowing from" the mail fraud and wire fraud racketeering activity of the Defendants.

A. The Court of Appeals and the District Court Opinions Are In Conflict With United States Supreme Court Precedent.

In *Sedima, S.P.R.L. vs. Imrex Company, Inc.*, 473 U.S. 479, at 497 and 498 (1985), this Court thoroughly analyzed the history and language of 18 U.S.C. §1964(c), and established general guidelines for determining standing to maintain a RICO action. The following excerpts from the opinion demonstrate these guidelines:

> " . . . '[R]acketeering activity, consists of no more and no less than commission of a predicate act. §1961(1). . . . If the defendant engages in a pattern of racketeering activity in a manner forbidden by [§§1962(a)-(c)], and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under §1964 (c). . . .
>
> A violation of §1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a pattern

> (4) of racketeering activity. . . . In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation."

In addition to the quoted remarks the *Sedima* opinion in footnote 15 implies that recovery may be had either for direct injury or for indirect injury, so long as the injury "flows from" the predicate acts.

Against these guidelines, the District Court opinion, affirmed without modification by the Court of Appeals, held that an individual *indirectly* injured by a RICO violation cannot maintain a RICO action. The District Court thus inappropriately focused on the question of whether the alleged injury was direct or indirect, rather than on the question of whether the injury flowed from the predicate acts of the defendants.

B. The Decision of the District Court Affirmed by the Court of Appeals is in Conflict with Other Opinions of the Eighth Circuit, and with Opinions from Other Circuits.

Ironically, the Eighth Circuit previously has held that *indirect* injury may confer standing under RICO. *Terre Du Lac Ass'n. Inc. vs. Terre Du Lac, Inc.*, 772 F.2d 467 (1985), cert. den. 475 U.S. 1082 (1986); *Alexander Grant & Co. vs. Tiffany Industries, Inc.*, 742 F.2d 408 (1984), vacated and remanded, 473 U.S. 922 (1985), on remand, 770 F.2d 717 (1985), cert. den. 474 U.S. 1058 (1986). In the latter case, after remand, the Eighth Circuit stated that "Sedima cannot fairly be interpreted as reading into section 1964(c) a

direct injury versus indirect injury distinction." 770 F.2d at 719.

A prominent commentator has observed that the Second Circuit, in *Sperber vs. Boesky,* 849 F.2d 60 (1988); the First Circuit, in *Bass vs. Campagnone,* 838 F.2d 10 (1988); and the Fifth Circuit, in *Zervas vs. Faulkner,* 861 F.2d 823 (1988), have all construed *Sedima,* particularly footnote 15, as permitting standing to sue for at least some types of indirect injury. The commentator goes on to note that the circuits are now about evenly divided on whether a plaintiff has standing to bring suit for indirect injuries. David Smith, *Civil RICO,* Matthew Bender & Co., Inc., at p. 6-68.1. Another approach was taken by the Fourth Circuit in *Brandenburg vs. Seidel,* 859 F.2d 1179 (1988), in which the Court thought that normal tort causation questions were dispositive of standing, taking into consideration such factors as the foreseeability of the injury, the intervention of other independent causes, and the factual directness of the causal connection. *Id.* at 1189.

In private antitrust actions under section 4 of the Clayton Act (the generic model for civil RICO), causation is shown when the antitrust violation was a "material cause" of the injury (see, e.g., *Zenith Radio Corp. vs. Hazeltine Research, Inc.,* 395 U.S. 100 (1969)), or a "substantial factor" in causing the injury (see, e.g., *Bigelow vs. RKO Radio Pictures,* 327 U.S. 251 (1946)). See also *Response of Carolina, Inc. vs. Leasco Response, Inc.,* 537 F.2d 1307 (5th Cir., 1976), holding that an antitrust plaintiff need not show the violation was the only cause of the injury, but only that it was one of the material causes of the injury.

II.

DISMISSAL WITHOUT OPPORTUNITY TO SUBSTITUTE A NEWLY DETERMINED REAL PARTY IN INTEREST, OR OTHERWISE TO SHOW STANDING IN LIGHT OF THE COURT'S DECISION, WAS A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND CONTRARY TO FEDERAL RULES OF CIVIL PROCEDURE.

The District Court, upon limited remand for the purpose of reconsidering its earlier opinion in light of a new Supreme Court decision, instead departed from that directive of the Court of Appeals, and permitted the Defendants to file new Motions to Dismiss under Rule 12 (b) (6) of the Federal Rules of Civil Procedure. The District Court then dismissed the Amended Complaint on grounds unrelated to the purpose of the remand. Because the Court of Appeals had retained jurisdiction, ACC was precluded from seeking relief from the new judgment, in order to amend its Complaint or otherwise comply with Federal Rules. See App. M, N, and O, *infra*.

This procedure was particularly egregious because the District Court held in effect that Commonwealth's Receiver was the real party in interest, and that ACC had alleged no demand upon the Receiver to bring this action as a prerequisite to a derivative suit. ACC stands ready to allege and prove the following:

> (a) That it would have been futile for the Plaintiffs to have made demand on the Receiver prior to commencement of this action, thus excusing any requirement for a prerequisite demand (See App. N, *infra*);

> (b) That on December 2, 1988, the Receiver assigned to ACC all causes of action set forth in this action (except as they pertain to the Defendant Paul Amen), so that ACC would become the real party in interest in any event under Rule 17, Fed. Rul. Civ. Proc.

Rule 17(a), Fed. Rul. Civ. Proc., provides that no action shall be dismissed on the ground that it is not prosecuted by the real party in interest until a reasonable time has been allowed for ratification by or joinder or substitution of the real party in interest. Notes of the Advisory Committee as to Rule 17(a) include the following:

> "The provision that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after the objection has been raised, for ratification, substitution, etc., is added simply in the interests of justice. . . . Modern decisions are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is to be filed. . . . The provision . . . is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made."

ACC believes this action is not a derivative action, and that ACC is in fact the real party in interest, as assignee of its members' causes of action for injury to their property. If ACC is found to be mistaken in this belief, then the causes of action of its members will be forfeited because (a) there has been no action by the Receiver to enforce their claims under RICO, and (b) by

any reasonable standard the four-year statute of limitations for RICO actions has now expired.

Forfeiture of these actions as a consequence of a long-delayed and hotly contested resolution of a murky legal issue would be an injustice of grave dimensions, and precisely the sort of injustice intended to be prevented by Rule 17(a). If the District Court was in fact constrained not to follow the precepts of the Rule by the jurisdictional limitations of the order of remand, then the Court of Appeals not only allowed but brought about this departure from the accepted and usual course of judicial decisions, and brought about a violation of Rule 17(a).

Moreover, Rule 15(a) of the Federal Rules of Civil Procedure provides as follows:

> "A party may amend the party's pleadings . . . only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . . "

In *Foman vs. Davis,* 371 U.S. 178 (1962), this Court reiterated that amendments are to be freely granted, even after a complaint has been dismissed. See also, 3 Moore, Federal Practice ¶¶ 15.08, 15.10 (2d ed. 1948). Normally, leave to amend is within the discretion of the district court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion. *Zenith Radio Corp. vs. Hazeltine Research, Inc.,* 401 U.S. 321 (1971).

Even after an appellate court's remand for further proceedings, the district court may permit an amendment to establish jurisdiction (unless amendment is precluded

by the mandate of the court of appeals). *Majd-Pour vs. Georgianna Community Hospital, Inc.*, 724 F.2d 901 (11th Cir., 1984). ACC made a timely request for Relief from the judgment in order to seek leave to file an Amended Complaint to show that demand upon the Receiver would have been futile. (App. N, *infra*, p. 2). This request was denied on the ground that jurisdiction was in the court of appeals. (App. O, *infra*).

It is also significant that the District Court cited in support of its decision the case of *Weimer vs. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990), but failed to implement the policy and guidance of *Weimer*. In *Weimer*, the Nebraska Supreme Court had ruled in a case related to this one that the state law causes of action of Weimer and ACC should have been brought by Commonwealth's Receiver because of the operation of a Nebraska statute pertaining to receiverships. The Nebraska Supreme Court remanded that case to the state trial court, however, with directions to the trial court to permit an amendment of the petition to allege either that demand had been made on the Receiver to file suit, or that demand on the Receiver would have been futile. On this subject, the Court stated the following:

> "Although the receiver was the proper party to enforce that liability, the appellants are not left without a remedy in this situation. While §8-199 gives the receiver broad authority to enforce claims on behalf of the bank, its shareholders, and creditors, we find that the shareholders and creditors must be afforded relief when the receiver fails or neglects to enforce a claim." App. I, *infra*, p. 20.

CONCLUSION

The Petition for Certiorari should be granted to resolve a division among the circuits about the meaning of language in *Sedima S.P.R.L. vs. Imrex Company, Inc., supra,* concerning standing to sue under the RICO Act, and concerning the requirement of injury flowing from the predicate acts of the Defendants.

In addition, to prevent manifest injustice and forfeiture of the claims of thousands of depositors of Commonwealth Savings Company without a hearing on the merits of their claims, this case should be reviewed for correction of the departures of the Court of Appeals and the District Court from accepted and usual judicial practices.

Respectfully submitted

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Counsel of Record
for the Petitioners

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2331

Claude R. Weimer, for himself; and Association of Commonwealth Claimants, an unincorporated association,

Appellants,

v.

Paul Amen; S. E. Copple; Marvin Copple; Members of the Nebraska Depository Institution Guaranty Corporation; Commercial Savings of Columbus, Inc. Employer of Ken Wellman; First Savings Company Employer of William Beckman; First National Bank, Owner of First Savings Co. of Grand Island, Norwest Corporation, Owner of First National Bank, Grand Island; Commerce Group, Inc., Owner of Commercial Savings of Columbus, Inc., and Commerce Savings Lincoln, Inc.; Commerce Savings Lincoln, Inc., Employer of Douglas Alford; Provident Federal Savings Bank, Owner of Liberty Savings Company; Employer of Alfred Adams and Kenlon Hake;

Appeal from the United States District Court for the District of Nebraska.

[UNPUBLISHED]

American State Savings Company, *
Employer of Roy Askcraft; Federal*
Deposit Insurance Corporation, *
Employer of Darrell Anderson; *
Commerce Savings Scottsbluff, Inc.;*
Employer of Tim Spoeneman; *
Liberty Savings Company, *
Employer of Dennis Applebee; *
Owner of American Savings *
Company, Omaha; Marvin Copple,*
Director, N.D.I.G.C., and officer of*
Commonwealth, from before 1975 *
until after November 1, 1983; S. E.*
Copple Director, N.D.I.G.C., and *
officer of Commonwealth from *
before 1975 until after November *
1, 1983; Ken Wellman; William *
Beckman; Douglas Alford; Alfred *
Adams; Kenlon H. Hake; Roy *
Ashcraft; Darrell Anderson; Tim *
Spoeneman; Dennis Applebee; *
*
Appellees. *

Submitted: October 15, 1991

Filed: January 22, 1992

Before JOHN R. GIBSON, Circuit Judge, PECK,* Senior Circuit Judge, and HENLEY, Senior Circuit Judge.

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*The HONORABLE JOHN W. PECK, Senior Circuit Judge for the United States Court of Appeals for the Sixth Circuit, sitting by designation.

PER CURIAM.

Following the decision of the Supreme Court in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989), this case was remanded to the district court for further proceedings. The district court ruled that Weimer and the class of depositors he sought to represent did not have standing to assert claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. §§ 1961-1968 (West 1984 & Supp. 1991), for the reason that their claims are derivative and that only the bank or its receiver may recover for such wrongs. *Weimer v. Amen*, No. 86-L-248, slip op. at 7 (D. Neb. Aug. 24, 1990). We requested additional briefing on the propriety of the district court's order.

We have now considered the parties' arguments, and conclude that the district court did not err in holding that Weimer and the class he seeks to represent have no standing to maintain this RICO action. We affirm on the basis of the district court's carefully reasoned order. *See also In Re Sunrise Securities Litigation*, 916 F.2d 874, 879-89 (3d Cir. 1990). The district court also did not abuse its discretion in denying leave to file an amended complaint. The question of whether RICO is unconstitutional for vagueness, which was discussed by Justice Scalia in his concurrence in *H.J.*, 492 U.S. at 251 (Scalia, J., concurring in the judgment), presents an intriguing question. However, we do not reach constitutional questions unless we are required to do so, and our affirmance of the dismissal based on the lack of standing forecloses this inquiry.

We affirm the judgment of the district court dismissing this action. *See* 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 87-2331

Claude R. Weimer, for himself; and Association of Commonwealth Claimants, an unincorporated association,

Appellants,

v.

Paul Amen; S. E. Copple; Marvin Copple; Members of the Nebraska Depository Institution Guaranty Corporation; Commercial Savings of Columbus, Inc. Employer of Ken Wellman; First Savings Company Employer of William Beckman; First National Bank, Owner of First Savings Co. of Grand Island, Norwest Corporation, Owner of First National Bank, Grand Island; Commerce Group, Inc., Owner of Commercial Savings of Columbus, Inc., and Commerce Savings Lincoln, Inc.; Commerce Savings Lincoln, Inc., Employer of Douglas Alford; Provident Federal Savings Bank, Owner of Liberty Savings Company; Employer of Alfred Adams and Kenlon Hake;

Appeal from the United States District Court for the District of Nebraska.

(Filed MAR 10 1992)

American State Savings Company, *
Employer of Roy Askcraft; Federal*
Deposit Insurance Corporation, *
Employer of Darrell Anderson; *
Commerce Savings Scottsbluff, Inc.;
Employer of Tim Spoeneman; *
Liberty Savings Company, * (Filed
Employer of Dennis Applebee; * Jan. 22 1992)
Owner of American Savings *
Company, Omaha; Marvin Copple,*
Director, N.D.I.G.C., and officer of*
Commonwealth, from before 1975 *
until after November 1, 1983; S. E.*
Copple Director, N.D.I.G.C., and *
officer of Commonwealth from *
before 1975 until after November *
1, 1983; Ken Wellman; William *
Beckman; Douglas Alford; Alfred *
Adams; Kenlon H. Hake; Roy *
Ashcraft; Darrell Anderson; Tim *
Spoeneman; Dennis Applebee; *
*
Appellees. *
*

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this

cause is affirmed in accordance with the opinion of this Court. *See* 8th Cir. R. 47B.

January 22, 1992

A true copy.

Attest: Michael E. Gans

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

CLAUDE T. WEIMER, for himself, et al., Plaintiffs, v. PAUL AMEN, et al., Defendants.	CV. 86-L-248 ORDER (Filed JAN 16 1987)

This matter is before the Court on the following motions to dismiss:

Paul Amen (Filing No. 12);

Commerce Savings (Filing No. 16);

SSS Co., formerly State Securities Savings Co. (Filing No. 17);

Provident Federal Savings (Filing No. 27);

Ken Wellman, William Beckman, Douglas Alford, Alfred Adams, Kenlon Hake, Tim Spoeneman and Dennis Applebee (Filing No. 28, amended at Filing No. 35);

Norwest Corp. (Filing No. 30);

First Savings Co., First National Bank, Norwest Corp. (Filing No. 31);

American State Savings (Filing No. 37);

American Security Bank (Filing No. 38); and

American Savings Co. (Filing No. 44).

The motions to dismiss are based upon standing to sue, the statute of limitations, and Rule 12 of the Federal Rules of Civil Procedure. Defendants' motions to dismiss are mostly predicated upon Fed.R.Civ.P. 12(b)(6). In considering a motion to dismiss under Rule 12(b)(6), allegations in the complaint must be viewed in a light most favorable to the plaintiff. **Fusco v. Xerox Corp.**, 676 F.2d 332, 334 (8th Cir. 1982). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled [sic] him to relief." **Conley v. Gibson,** 355 U.S. 41, 45-46 (1957) (footnote omitted). Based upon the parties' briefs, arguments set forth at a hearing regarding the motions to dismiss, and a liberal reading of plaintiffs' complaint, this Court finds plaintiffs' complaint should be dismissed for failure to state a claim for it appears beyond doubt that plaintiffs can prove no set of facts in support of their claim, as pled, which would entitle them to relief.

The dispute in this case arises from the failure of the Commonwealth Savings Company of Lincoln, Nebraska (Commonwealth). The plaintiffs are one individual, Claude T. Weimer, and an unincorporated association, the Association of Commonwealth Claimants (ACC). The ACC is the assignee of claims of the owners of passbook savings accounts, certificates of indebtedness, money market accounts, individual retirement accounts, pension and welfare funds, trust accounts, promissory notes, capital notes, and uncollected checks of Commonwealth, as well as general creditors of Commonwealth or the personal representatives of such persons.

The defendants include Paul Amen, the former Director of the Department of Banking and Finance of the State of Nebraska; two officers of Commonwealth, Marvin Copple and S. E. Copple; the Directors of the Nebraska Depository Institution Guaranty Corporation (NDIGC), their employers and their employers' owners. The NDIGC was established pursuant to Nebraska law with the approval of the Department of Banking and Finance. Neb.Rev.Stat. § 21-17,132. **See generally,** Neb.Rev.Stat. §§ [21-]17,127-[21-]17,145 (Reissue 1983).

Plaintiffs' claims are based upon the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961, **et seq.** The provisions of 18 U.S.C. § 1962 under which the plaintiffs sue defines [sic] the activities which the statute prohibits: (a) the use or investment of any income derived from a pattern of racketeering activity in the acquisition, establishment or operation of an enterprise engaged in interstate commerce; (b) the acquisition of any interest or control in an enterprise engaged in interstate commerce through the collection of unlawful debt of a pattern of racketeering activity; (c) to conduct or participate in the conduct of the enterprises' affairs through a pattern of racketeering activity or collection of unlawful debt; (d) to conspire to violate subsections (a), (b) or (c).

The complaint does not specify which subsections of Section 1962 were violated. Plaintiffs have alleged violations of: 18 U.S.C. § 1341, mail fraud (Complaint Paragraph 9(a)); 18 U.S.C. § 664, embezzlement from pension and welfare funds (Complaint Paragraph 9(b)); 18 U.S.C. §§ 891-94, extortionate credit transactions (Complaint Paragraph 9(c)); 18 U.S.C. § 1343 (wire fraud Complaint Paragraph 9(d)); 18 U.S.C. §§ 1503, 1510, 1511, obstruction

of justice, obstruction of criminal investigations, obstruction of state or local law enforcement (Complaint Paragraph 9(e)); 18 U.S.C. § 2314, 2315, interstate transportation of stolen property (Complaint Paragraph 9(f)); 18 U.S.C. § 1961(1)(D), fraud in the sale of securities (Complaint 9(g)).

I. STANDING TO SUE

Defendants assert that plaintiff Association of Commonwealth Claimants (ACC), as the assignee of individual claims, does not have standing to sue. Defendants claim the ACC does not have standing to sue on behalf of its members as an association under the test set forth in **Hunt v. Washington Apple Advertising Commission,** 432 U.S. 333, 343 (1975). Under this test, the Association must show (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members of the lawsuit.

The ACC does not meet the three-part test set out in Hunt for associational standing. However, ACC is not basing its power to sue on the doctrine of associational standing. Instead, the ACC asserts standing as the assignee of the claims of its members. An association has standing to sue in such a situation if the assignment of the claims is valid. **Louisiana Farmers' Protective Union v. Great A & P Tea Co.,** 131 F.2d 419, 423 (8th Cir. 1942).

In **Louisiana Farmers,** an association asserted the rights of 8,795 assigned claims. The Eighth Circuit

reversed the dismissal of the action without leave to amend, granted leave to amend and required that the damages suffered by each assignor be set out in the complaint. **Id.** at 423.

In **Healthcare Equalization v. Iowa Medical Society,** 501 F.Supp. 970 (S.D.Ia. 1980), the district court noted the Eighth Circuit's requirement in **Louisiana Farmers** that the complaint assert the individual damage claims of each assignor but held that such information need not be specifically pleaded and was a proper matter for discovery. **Healthcare Equalization,** 501 F.Supp. at 979.

Thus, the ACC has chosen a method recognized by the Eighth Circuit to present its claims and has standing to sue in this action. Specific details on the identity and damages suffered by assignors in such actions are proper subjects for discovery.

Although not raised by any of the defendants, RICO claims are assignable. **In re National Mortgage Equitable Corp. Mortgage Pool,** 636 F.Supp. 1138, 1155-56 (C.D.Cal. 1986) (assignment of RICO claims serve to effectuate RICO's broad remedial purposes).

II. STATUTE OF LIMITATIONS

Defendants allege that plaintiffs' RICO claim is time barred by the statute of limitations, asserting that the appropriate statute of limitations is Neb.Rev.Stat. § 25-208, which provides a one-year statute of limitations for actions upon a statute for a penalty or forfeiture. Defendants characterize RICO claims as punitive actions due to RICO's treble damages provision, and assert that

under the one-year limitations period, this action is time barred.

Congress did not establish a time limitation applicable in RICO actions. The settled practice in such a situation is to turn to the law of the forum state to "borrow" the limitations period for the state cause of action most closely analogous to the case at hand. **Board of Regents v. Tomanio,** 446 U.S. 478, 483-84 (1980). In **Wilson v. Garcia,** 105 S.Ct. 1938 (1985), the United States Supreme Court established a three-part test to guide the selection of the appropriate statute of limitations in a federal claim.

1) Determine whether state or federal law governs the characterization of the claim;

2) If federal law applies, decide whether all claims arising under a particular federal law "should be characterized in the same way, or whether they should be evaluated differently depending on the varying factual circumstances and legal theories presented in each individual case."

3) Characterize the "essence of the claim" in the case at hand and "decide which state statute provides the most appropriate limiting principle." **Wilson,** 105 S.Ct. at 1943.

Following the steps delineated by the court in **Wilson,** the first step taken is to decide whether state or federal law is the controlling law for statute of limitations purposes. The problem of characterizing a federal claim for statutory purposes has usually been held to be a question of federal law. **Wilson,** 105 S.Ct. at 1944. Further, the federal interests in uniformity and having "firmly

defined, easily applied rules" as stated in **Wilson,** in regard to a Section 1983 claim are equally applicable in RICO actions. **See Malley-Duff & Associates v. Crown Life Insurance Co.,** 792 F.2d 341 (3d Cir. 1986); **Tellis v. United States Fidelity & Guaranty Co.,** 805 F.2d 741 (7th Cir. 1986).

Step 2 consists of deciding whether all RICO claims should be uniformly characterized or evaluated differently on a case by case basis. Among the appellate courts which have decided this issue, most have selected the uniform approach. **See Malley-Duff & Associates,** 792 F.2d at 347-49; **Hunt v. American Bank & Trust Co.,** 783 F.2d 1011 (11th Cir. 1986); **Tellis,** 805 F.2d at 744-45, **but see Silverberg v. Thomson McKinnon Securities, Inc.,** 787 F.2d 1079 (6th Cir. 1986) (case by case approach). At the district court level, "almost all the courts facing the issue have followed the uniform approach." **Tellis,** 805 F.2d at 744 (citing numerous cases). Selection of the case by case approach "inevitably breeds uncertainty and time-consuming litigation," **Wilson,** 105 S.Ct. at 1945.

Due to the nature of RICO actions, a single RICO action could be characterized in a myriad of ways depending upon the predicate acts alleged. The predicate acts may themselves each be subject to differing limitations periods, thus forcing courts to decide the predominant predicate act. The federal interest in uniformity and certainty and the desire to avoid time-consuming litigation would be frustrated by the choice of the case by case methodology. Thus, this Court will follow the majority of courts in selecting the uniform characterization approach.

Having selected the uniform approach, the final step is to "characterize the essence of the federal claim" and select the appropriate state limitations period for all civil RICO actions. There are three options: (a) the limitations period for actions upon a statute for a penalty or forfeiture of one year. Neb.Rev.Stat. § 25-208; (b) the limitations period for actions upon a liability created by a federal statute, other than a forfeiture or a penalty of three years. Neb.Rev.Stat. § 25-219; (c) the limitations period covering fraud of four years. Neb.Rev.Stat. § 25-207.

The defendants argue that the one-year period for a statutory penalty is the appropriate statute of limitations. This Court disagrees, as civil RICO is not a forfeiture statute nor is the treble damages provision primarily intended to serve as a penalty. **Malley-Duff,** 792 F.2d at 351 (**citing ABA Section of Corporation, Banking & Business Law,** Report of the Ad Hoc Civil RICO Task Force, 391 (1985)). Civil RICO is an incentive for "private attorneys general to bring suit, and to focus on the treble damages remedy of the claim ignores the 'essence of civil RICO.' Further, to adapt the short, one-year limitations period for civil RICO claims would frustrate the broad remedial purposes of civil RICO." **See Malley-Duff,** 792 F.2d at 351. Civil RICO, therefore, is not characterized by this Court as a penal statute and as such, this action was filed in a timely manner.

It is not necessary for the Court to determine which of the two remaining statute of limitations (Neb.Rev.Stat. §§ 25-207 or 25-219) is the most appropriate.

III. DEFENDANTS IN BANKRUPTCY

Both State Security Savings Company and American Savings Company argue plaintiffs' claims against them should be dismissed because both institutions have recently been reorganized pursuant to Chapter 11 of the United States Bankruptcy Code. 11 U.S.C. § 101, **et seq.** State Security Savings Company (presently known as SSS Co.) filed a Chapter 11 petition with the United States Bankruptcy Court for the District of Nebraska on July 9, 1984. SSS Co. subsequently filed a Plan of Reorganization with the Bankruptcy Court. The plan was approved by the requisite number of creditors and confirmed by the Bankruptcy Court on February 8, 1985. Similarly, American Savings Company filed its petition for reorganization on January 25, 1985. Its Plan of Reorganization by the requisite number and amount of its creditors and confirmed by the Bankruptcy Court on December 10, 1985. Plaintiffs filed this action on March 4, 1986.

The defendants each contend any claims plaintiffs may have had against them were discharged once the plans were confirmed. Their contention is correct. Bankruptcy Code Section 1141(d)(1) provides:

> Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan –
>
> (A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in Section 502(g), 502(h), or 502(i) of this title, whether or not –
>
> (i) a proof of the claim based on such debt is filed or deemed filed under Section 501 of this title;

> (ii) such claim is allowed under Section 502 of this title; or
>
> (iii) the holder of such claim has accepted the plan * * * .

In accordance with Section 1141(d)(1), plaintiffs' two causes of action constitute discharged debts of State Security Savings Company and American Savings Company. Section 101(11) of the Bankruptcy Code defines "debt" as "liability on a claim." A "claim" is in turn defined as:

> (A) right to payment, whether or not such right is reduced to judgment, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

11 U.S.C. § 101(4).

The parties are in apparent agreement that plaintiffs' claims arose, at the latest, when Commonwealth was declared insolvent on November 1, 1983. Once Commonwealth failed, it became clear that the NDIGC assets would be insufficient to cover the amounts owed to depositors and creditors. Thus, any debt owed to plaintiffs by State Security Savings Company or American Savings Company arose before their reorganization plans were confirmed. This same debt was discharged once the plans were confirmed because none of the exceptions to discharge apply to the debt and neither the plans nor the

confirmation orders provide for treatment of the debt. Therefore, State Security Savings Company and American Savings Company should be dismissed as defendants to this action.

IV. PATTERN OF RACKETEERING ACTIVITY

Defendants claim the complaint fails to allege a pattern of racketeering activity. In **Sedima, S.P.R.L. v. Imrex Co.**, 105 S.Ct. 3275 (1985), the United States Supreme Court held that a violation of Section 1962(c) requires "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Although it is unclear from the complaint which subsection of Section 1962 the plaintiffs rely upon, a pattern of racketeering activity is required in all of them (**see** 18 U.S.C. § 1962(a), (b), (c). Also note subsection (d) which makes it unlawful to conspire to violate any of the above subsections).

The definition of "pattern of racketeering activity" was dealt with in footnote 14 of **Sedima.** In footnote 14, the United States Supreme Court noted that to constitute a pattern of racketeering activity, there must be more than isolated episodes of racketeering. The Court noted there must be a combination of continuity plus relationship. Footnote 14 states:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in Section 1961 in that it states that a pattern "requires at least two acts of racketeering activity," Section 1961(5) (emphasis added [in **Sedima**]), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be

> sufficient. Indeed, in common parlance, two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: *The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this fact of* ***continuity plus relationship*** *which combines to produce a pattern.* (Emphasis added).

S.Report 91-617, p. 158 (1969); **Sedima**, 105 S.Ct. at 3285.

The Supreme Court invited courts to build on this notion and to "develop a meaningful concept of pattern." **Sedima,** 105 S.Ct. at 3287.

The Eighth Circuit responded to this invitation in the case of **Superior Oil v. Fulmer,** 785 F.2d 252 (8th Cir. 1986). In **Superior Oil,** the Court found that Superior had failed to prove defendants engaged in a pattern of racketeering activity because there was no proof of the continuity prong of the "continuity plus relationship" requirement. **Id.** at 257. The Court noted that there was no proof that the defendants had ever "done these activities in the past and there was no proof that they were engaged in other criminal activities elsewhere." **Id.** The Court further noted "proof of a threat of continuing racketeering activities in the future could, in combination with ongoing acts of racketeering, be sufficient to establish a "pattern of racketeering." **Id.** Such was not the case in **Superior Oil,** however, as there was only "one isolated fraudulent scheme." **Id.**

The fact that only one fraudulent scheme or effort existed was important to the Court in deciding whether a pattern of racketeering activity was present and the Court noted that it would place a "real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a pattern of racketeering activity." **Id.** at 257 (**quoting Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.,** 615 F.Supp. 828, 832 (N.D.Ill. 1985)).

Such a strain of the language also exists in the instant case where the plaintiffs have alleged nothing more than a single scheme implemented by several fraudulent acts. Here the allegations are that the defendant committed various acts to further the single scheme of inducing investments with Commonwealth. All the alleged acts were in furtherance of this single scheme. Further, there are no allegations of past or ongoing acts of racketeering nor of a threat of continuing racketeering activity. There is nothing in this complaint which indicates a pattern of racketeering activity. The mere pleading of certain predicate acts does not mean a plaintiff is entitled to proceed on a cause of action under RICO.

The target of RICO is not the sporadic type of activity which is present in this case, but the infiltration of legitimate business through a pattern of racketeering activity. The alleged pattern in this case is nothing more than the commission of fraudulent acts to further a single isolated scheme of inducing investments in Commonwealth. As RICO is not aimed at the isolated offense, but at a multiplicity of events, the plaintiffs have failed to allege a pattern of racketeering activity. Accordingly,

IT IS HEREBY ORDERED that defendants' motions to dismiss are granted and plaintiffs' complaint is dismissed.

IT IS FURTHER ORDERED that the scheduling conference which was to be held January 23, 1987, is cancelled.

DATED this 16th day of January, 1987.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

CLAUDE T. WEIMER, for himself, et al., Plaintiffs, v. PAUL AMEN, et al., Defendants.	CV. 86-L-248 ORDER (Filed Jan. 22, 1987)

IT IS HEREBY ORDERED that the Order previously filed in this matter on January 16, 1987, is corrected to read as follows:

Page 3, paragraph 2:

* * * (b) the acquisition of any interest or control in an enterprise engaged in interstate commerce through the collection of unlawful debt *or* a pattern of racketeering activity; * * *

Page 9, paragraph 3:

* * * Its Plan of Reorganization *was approved* by the requisite number and amount of its creditors and confirmed by the Bankruptcy Court on December 10, 1985. * * *

DATED this 22nd day of January, 1987.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

CLAUDE T. WEIMER, for himself, et al., Plaintiffs, v. PAUL AMEN, et al., Defendants.	CV. 86-L-248 MEMORANDUM OPINION (Filed Aug. 28, 1987)

This matter is before the Court on the following motions to dismiss: American State Savings, American Security Bank (Filing No. 140); Kenneth Wellman, William Beckman, Douglas Alford, Alfred Adams, Kenlon Hake, Roy Ashcraft, Darrel D. Anderson, Timothy Spoeneman, and Dennis Applebee (Filing No. 141); Provident Federal Savings Bank (Filing No. 142); Commerce Group, Inc., Commerce Savings Lincoln, Inc., Commerce Savings Columbus, Inc., Commerce Savings Scottsbluff, Inc. (Filing No. 143); First National Savings Company Grand Island, First National Bank of Grand Island, Norwest Corporation (Filing No. 144); and Paul Amen (Filing No. 147). On January 16, 1987, the Court entered an order granting the defendants' motion to dismiss the original complaint in this case. On March 30, 1987, the Court granted plaintiffs' motion to set aside order of dismissal and for leave to file an amended complaint.

The motions to dismiss the amended complaint are predicated upon Fed.R.Civ.P. 12(b)(6). In considering a

motion to dismiss under Fed.R.Civ.P. 12(b)(6), allegations in the complaint must be viewed in the light most favorable to plaintiff. **Fusco v. Xerox Corp.**, 676 F.2d 332, 334 (8th Cir. 1982). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." **Conley v. Gibson**, 355 U.S. 41, 45-46 (1957) (footnote omitted). Based upon the parties briefs and a liberal reading of the plaintiffs' complaint, this Court finds plaintiffs' complaint should be dismissed for failure to state a claim for it appears beyond doubt that plaintiffs can prove no set of facts in support of their claims, as pled, which would entitle them to relief.

The dispute in this case arises from the failure of Commonwealth Savings Bank of Lincoln, Nebraska. Plaintiffs' claims are based upon the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961, **et seq.**, and common law claims under state law. The original complaint was dismissed as it failed to allege a pattern of racketeering activity. Specifically, the original complaint alleged nothing more than a single scheme (inducing investments in Commonwealth) implemented by several fraudulent acts. The original complaint did not allege any past or ongoing acts of racketeering nor of a threat of continuing racketeering activity and was accordingly dismi :d.

Plaintiffs' amended complaint does not cure the defect in the original complaint and must be dismissed for the same reason, that is, failure to allege a pattern of racketeering activity. The only change in plaintiffs' amended complaint is a cosmetic one. The plaintiffs now

allege various "schemes" by the defendants to induce investments and deposits in other NDIGC member institutions, not solely in Commonwealth. The various "schemes" alleged, however, does not cure the defect in the original complaint. When analyzed, they simply constitute part of one scheme which plaintiffs have artificially broken down and embellished to simulate the appearance of a pattern.

The acts alleged constitute a one-time plan to accomplish a single goal – that of inducing deposits into member institutions by false portrayals of the security of these institutions. The allegations do not amount to the type of continuous criminal activities that establish a pattern of racketeering activity. An analogous factual situation was present in the case of **Brandenburg v. First Maryland Savings & Loan, Inc.**, 660 F.Supp. 717, 727-28 (D.Md. 1987), where the court found the allegations did not set forth the type of continuous criminal behavior required to establish a pattern of racketeering activity under RICO.

To constitute a pattern of racketeering activity, there must be more than isolated episodes of racketeering. There must by a combination of continuity plus relationship. **Sedima, S.P.R.L. v. Imrex, Co.**, 105 S.Ct. 3275, 3285 (1985), n.14 citing Senate Report:

> The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.

The Eighth Circuit has consistently held that a pattern of racketeering activity requires more than one scheme. **Ornest v. Delaware North Companies, Inc.**, 818 F.2d 651, 652 (8th Cir. 1987) (single scheme to defraud arena owners over eight-year period of their contractual share of vending machine profits failed to allege a pattern of racketeering activity); **Madden v. Gluck**, 815 F.2d 1163, 1164 (8th Cir. 1987) (alleged acts constituted mere subdivisions of only one scheme to keep corporation afloat in order to loot it); **Deviries v. Prudential-Bache Securities, Inc.**, 805 F.2d 326, 329 (8th Cir. 1986) (one scheme to generate excessive sales commissions by recommending unsuitable investments insufficient to state RICO claim); **Superior Oil v. Fulmer**, 785 F.2d 252, 257 (8th Cir. 1986) (proof of one isolated fraudulent scheme insufficient to constitute a pattern of racketeering).

Although the amended complaint here alleges various acts on the part of the defendants, they were all in furtherance of a single scheme. As RICO is not aimed at the isolated offense but at a multiplicity of events, the plaintiffs have failed to allege a pattern of racketeering activity and the complaint must be dismissed. Consequently, the pendent state law claims must also be dismissed. Accordingly, a separate order will be entered this date dismissing plaintiffs' amended complaint.

DATED this 28th day of August, 1987.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

CLAUDE T. WEIMER, for himself, et al., Plaintiffs, v. PAUL AMEN, et al., Defendants.	CV. 86-L-248 ORDER (Filed Aug. 28, 1987)

Pursuant to the memorandum opinion entered herein this date,

IT IS HEREBY ORDERED that defendants' motions to dismiss are granted and plaintiffs' amended complaint is dismissed.

DATED this 28th day of August, 1987.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM
UNITED STATES DISTRICT JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

CLAUDE T. WEIMER, et al., Plaintiffs, v. PAUL AMEN, et al., Defendants.	CV. 86-L-248 MEMORANDUM OPINION (Filed 90 AUG 24)

This matter is before the Court following remand by the United States Court of Appeals for the Eighth Circuit for further consideration of this Court's order dismissing plaintiff's complaint in light of the United States Supreme Court's rejection of the Eighth Circuit's theory of single scheme of racketeering in actions based upon the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961, *et seq.*[1] Subsequent to the remand by the Eighth Circuit, defendants have filed amended motions to dismiss.

This dispute arises from the failure of Commonwealth Savings Company of Lincoln, Nebraska (hereinafter Commonwealth).[2] Plaintiffs, Claude Weimer and the

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[1] *See, H. J., Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989).

[2] For an historical review of the failure of Commonwealth Savings, *see, Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990).

Association of Commonwealth Claimants, an unincorporated association, as assignees of various depositors of the Commonwealth, base their claims upon RICO and common law claims under state law.

On January 16, 1987, this Court entered an order granting the defendants' motion to dismiss the original complaint in this action, concluding that the original complaint failed to allege a pattern of racketeering activity. Specifically, the original complaint alleged only a single scheme implemented by several fraudulent acts. The original complaint did not allege any past or ongoing acts of racketeering nor of a threat of a continuing racketeering activity. On March 30, 1987, the Court granted plaintiffs' motion to set aside the order of dismissal and for leave to file an amended complaint. Plaintiffs' amended complaint did not cure the defect in the original complaint and was accordingly dismissed. The order dismissing plaintiffs' second amended complaint was appealed to the Eighth Circuit. On November 15, 1989, the Eighth Circuit remanded the action to this Court for further consideration in light of *H. J., Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989), which held that the Eighth Circuit's single scheme theory which this Court had relied upon in dismissing the complaint was in error. The Eighth Circuit retained jurisdiction in the matter, ordering that this Court certify any order entered on a motion to dismiss (Filing No. 160).

The following defendants have since filed amended motions to dismiss: Paul Amen (Filing No. 162); Kenneth Wellman, William Beckman, Douglas Alford, Alfred Adams, Kenlon Hake, Roy Ashcraft, Darrell Anderson, Timothy Spoeneman, and Dennis Applebee (Filing No.

164); Provident Federal Savings Bank (Filing No. 165); and Commerce Group, Inc., Commerce Savings Lincoln, Inc., Commerce Savings Columbus, Inc., Commerce Savings Scottsbluff, Inc., First Savings Company of Grand Island, First National Bank of Grand Island, and Norwest Corporation (Filing No. 166).

Defendants' amended motions to dismiss are predicated upon Fed. R. Civ. P. 12(b)(6). Following a March 9, 1990, hearing on the motions, the Court deferred further consideration of the matter pending a ruling from the Nebraska Supreme Court with respect to plaintiff's standing to maintain their related state court action. The Nebraska Supreme Court has since ruled that plaintiffs lack standing.[3]

In considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), allegations in the complaint must be viewed in the light most favorable to the plaintiff. *Fusco v. Xerox Corp.*, 676 F.2d 332, 333 (8th Cir. 1982). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). Based upon the parties briefs and a liberal reading of the plaintiffs' complaint, the Court finds that plaintiffs lack standing to maintain this action.

"[A] plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496

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[3] *Weimer v. Amen, supra, rehearing denied* August 1, 1990.

(1985). The question therefore becomes whether Weimer and the class of depositors he seeks to represent have suffered an individual injury distinct from any injury to the corporation so as to provide them with standing to maintain a non-derivative RICO action. *Crocker v. FDIC*, 826 F.2d 347 (5th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988). "An individual indirectly injured by a RICO violation cannot maintain a RICO action in his or her own name, since his or her claims are derivative of the directly injured parties' claims; 'an indirectly injured party should look to the recovery of the directly injured party, not to the wrongdoer, for relief.' " *In re Sunrise Sec. Litigation*, 108 Bankr. 471 (E.D. Pa. 1989) (quoting *Carter v. Berger*, 777 F.2d 1173, 1176 (7th Cir. 1985)).

In general, wrongs committed by a bank's officers or directors that injure all depositors and creditors alike create a liability which is an asset of the bank itself and for which only the bank or its receiver may recover. *In re Longhorn Sec. Litigation*, 573 F. Supp. 255 (W.D. Okla. 1983) (*citing Adato v. Kagan*, 599 F.2d 1111 (2d Cir. 1979)). Under such circumstances, "[t]he damage to depositors is indirect only, and it is generally recognized that for such matters, the depositor has no direct and individual right of action against the director." *Michelsen v. Penney*, 10 F. Supp. 537, 539 (S.D.N.Y. 1934) quoted in *In re Sunrise Securities Litigation*, 108 Bankr. 471 (E.D. Pa. 1989); *See* 1 Michie, *Banks and Banking*, Chap. 3, § 69 at 479 (1986) ("where the amount for which the officers and the directors may be liable results from matters affecting all creditors, they constitute assets of the corporation for the benefit of all depositors and creditors, and suit therefor must be brought by the Bank or its receiver"); *FDIC v.*

Renda, 492 F. Supp. 128, 137 (D. Kan. 1988) ("causes of action for negligence and wrongdoing by officers, directors or employees of a failed institution belong to the receiver of the institution and may not be brought by creditors, depositors or shareholders").

An individual depositor may bring a derivative action to recover for wrongs against the Bank or thrift which have indirectly injured the plaintiff and other depositors "but only after having made an unsuccessful demand on the bank or its receiver to bring suit." *In re Sunrise Securities Litigation, supra* (citing *In re Longhorn Securities Litigation, supra*). In the present action, plaintiffs do not allege an unsuccessful demand on the receiver to bring suit.

In an effort to demonstrate its standing to maintain this action, plaintiffs place great emphasis on its status as assignee of the Commonwealth depositor's claims. Relying on *Louisiana Farmer's Protective Union v. Great A & P Tea Co.*, 131 F.2d 419 (8th Cir. 1940), this Court, on January 16, 1987, concluded that the plaintiffs had standing to maintain this action by virtue of the assignment of the depositors claims to the Association of Commonwealth Claimants. After acknowledging that the present action had failed to meet the requirements for bringing an action as an association under the test dictated in *Hunt v. Washington Apple Advertising Comm.*, 432 U.S. 333 (1975), the Court stated, "ACC is not basing its power to sue on the doctrine of associational standing. Instead, the ACC asserts standing as the assignee of the claims of its members" (Filing No. 116). *Louisiana Farmer's*, however, presupposes that the assignors of the claims had standing to bring their actions as individuals. The Commonwealth

depositors lack such standing. *In re Longhorn Sec., supra; Michelsen v. Penney, supra. See also, Warth v. Seldin,* 422 U.S. 490 (1975).

The Court's conclusion today is consistent with the Nebraska Supreme Court's holding in *Weimer v. Amen,* 235 Neb. 287, 455 N.W.2d 145 (1990), wherein the plaintiffs in this action appealed a summary judgment by the district court for Lancaster County in favor of the present defendants. As in the present action, plaintiffs' state court petition alleged numerous improprieties in the management and supervision of the Commonwealth Savings Co. The Nebraska Supreme Court affirmed the trial court's summary judgment stating, "We have determined that appellants' actions are derivative and that they have not suffered individual harm upon which they can sue directly. Their actions are properly brought by the receiver." *Id.* at 302, 455 N.W.2d at ___.

As it appears beyond doubt that plaintiffs cannot prove they have suffered an individual injury distinct from any injury to Commonwealth, they lack standing to maintain this action, and defendants' amended motions to dismiss should be sustained. The receiver is the only party with standing to maintain the present action. As plaintiffs lack standing, the Court need not address the remaining arguments advanced by defendants in their amended motions to dismiss. In so much as this Court's order of January 16, 1987, holds that plaintiffs have standing to pursue this action, it should be vacated. These findings are hereby certified to the United States Court of Appeals for the Eighth Circuit. An order in conformity with this memorandum opinion shall issue this date.

DATED this 24th day of August, 1990.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM, Chief Judge
United States District Court

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

CLAUDE T. WEIMER, et al., Plaintiffs, v. PAUL AMEN, et al., Defendants.	CV. 86-L-248 ORDER (Filed Aug. 24, 1990)

Pursuant to the memorandum opinion entered herein this date,

IT IS ORDERED:

1) Defendants' amended motions to dismiss are granted and plaintiffs' second [sic] amended complaint is dismissed;

2) In so much as this Court's order of January 16, 1987, holds that plaintiffs have standing to pursue this action, it is vacated;

3) These findings are certified to the United States Court of Appeals for the Eighth Circuit.

DATED this 24th day of August, 1990.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM, Chief Judge
United States District Court

APPENDIX I

OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

Claude T. Weimer and Association of Commonwealth Claimants, an unincorporated association, Appellants and Cross-Appellees,

v.

Paul Amen et al., Appellees, Commerce Group, Inc., et al., Appellees and Cross-Appellants.

Case Caption

Weimer v. Amen

Filed May 11. 1990. Nos. 88-430, 88-652.

Appeal from the District Court for Lancaster County: Robert R. Camp, Judge. Affirmed in part, and in part reversed and remanded with directions.

Robert R. Gibson, of Professional Legal Associates of Nebraska, P.C., for appellants.

Robert M. Spire, Attorney General, and Charles E. Lowe for appellees Amen and Lake.

Gary L. Dolan, Trev E. Peterson, and Shirley K. Poland-Williams, of Knudsen, Berkheimer, Richardson & Endacott; James B. Cavanagh, of Erickson & Sederstrom; P.C.; John M. Guthery and Gregory H. Perry, of Perry, Guthery, Haase, & Gessford, P.C.; Baird, Holm, McEachen, Pedersen, Hamann & Strasheim; Cline, Williams, Wright, Johnson & Oldfather; Faegre & Benson; and Crosby, Guenzel, Davis, Kessner & Kuester for appellees Commerce Group et al.

WEIMER V. AMEN

NOS. 88-430, 88-652 - filed May 11, 1990.

1. Statutes: Appeal and Error. Statutory interpretation is a matter of law in connection with which this court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.

2. Statutes: Presumptions: Legislature: Intent: Appeal and Error. The general rules governing statutory construction and interpretation provide that in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; this court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. Furthermore, it is not within the province of this court to read a meaning into a statute which is not warranted by the legislative language; neither is it within the province of this court to read anything plain, direct, and unambiguous out of the statute. In construing a statute it is presumed that the Legislature intended a sensible, rather than an absurd, result.

3. Banks and Banking: Receivers: Debtors and Creditors. Neb. Rev. Stat. § 8-199 (Reissue 1983) grants the receiver broad authority to enforce all debts or other obligations of whatever kind or nature due to the creditors of the failed institution which arise by virtue of the institution's insolvency.

4. Banks and Banking: Receivers: Claims. In the absence of an allegation of an individual harm upon which a claimant can directly bring suit, claims are derivative and

are properly pursued by the receiver under Neb. Rev. Stat. § 8-199 (Reissue 1983).

5. Constitutional Law: Statutes. No vested rights are impaired by a statutory or constitutional provision which creates a remedy for an existing right.

6. Constitutional Law: Due Process: Banks and Banking: Receivers. Neb. Rev. Stat. § 8-199 (Reissue 1983) does not unconstitutionally deny access to the courts, violate due process, nor take property for a public purpose without just compensation.

7. Summary Judgment. Summary judgment is proper when the pleadings, depositions, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from the material facts, and the moving party is entitled to judgment as a matter of law.

8. Summary Judgment: Appeal and Error. In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

9. Demurrer: Pleadings: Appeal and Error. In reviewing an order sustaining a demurrer, this court accepts the truth of facts well pled and the factual and legal inferences which may be deduced from such facts, but does not accept conclusions of the pleader.

10. Demurrer: Pleadings. In ruling on a demurrer, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled.

11. Actions: Banks and Banking: Receivers. A depositor may bring a derivative action to recover for wrongs against the bank or financial institution, which wrongs have indirectly injured depositors, but only after having made an unsuccessful demand on the bank or its receiver to bring suit.

12. Courts: Judgments: Appeal and Error. Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the Supreme Court will affirm.

Boslaugh, White, Shanahan, Grant, and Fahrnbruch, JJ., and Ronin and Colwell, D. JJ., Retired.

PER CURIAM.

Claude T. Weimer, for himself, and the Association of Commonwealth Claimants, an unincorporated association, as assignees of various depositors of the Commonwealth Savings Company, brought an action against the defendants, alleging numerous improprieties in the management and supervision of the Commonwealth Savings Company, resulting in its subsequent insolvency, collapse, and liquidation. The defendants are Paul Amen, former director of the Department of Banking and Finance of the State of Nebraska; Barry Lake, former Department of Banking and Finance general counsel; various financial institutions, including members of the Nebraska Depository Institution Guaranty Corporation (NDIGC); and certain employees of the financial institutions, including the directors of the NDIGC.

Amen and Lake filed a motion for summary judgment, alleging that the causes of action against them were released by the settlement of a tort claim by the receiver of the Commonwealth Savings Company, said settlement being approved by order of the district court for Lancaster County, funded by the Legislature, and paid by the State Treasurer to the receiver. The district court sustained the motion and dismissed the petition as to Amen and Lake.

The remaining defendants filed demurrers to the amended petition, claiming, among other things, that plaintiffs were not the real party in interest and therefore lacked standing to bring suit. The district court sustained the demurrers on this basis and dismissed the petition, as it contained an incurable defect.

The plaintiffs appealed from the order granting summary judgment (case No. 88-430) and from the judgment sustaining the defendants' demurrers and dismissing the plaintiffs' petition (case No. 88-652). As both appeals are from a single district court case and present essentially the same issues, we will consider and dispose of both appeals in a single opinion.

A review of the receivership proceedings in the matter of the insolvency of Commonwealth Savings Company is set forth here in order to explain how the case at bar arrived at the present juncture.

The Commonwealth Savings Company (hereafter Commonwealth) was an industrial loan and investment company in Lincoln, Nebraska. On November 1, 1983, the Department of Banking and Finance (hereafter the department) took possession of Commonwealth pursuant

to Neb. Rev. Stat. §§ 8-416 (Reissue 1987) and 8-187 (Reissue 1983). On November 8, 1983, the district court for Lancaster County issued an order declaring Commonwealth insolvent and appointed the department as the receiver and liquidating agent of Commonwealth according to § 8-416 and Neb. Rev. Stat. § 8-198 (Reissue 1983).

The receiver proceeded to file with the State Claims Board two tort claims against the State of Nebraska pursuant to the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissues 1981 & 1987 & Supp. 1983). The first claim was filed on December 23, 1983, on behalf of the creditors of Commonwealth against the State, its officers, and employees for $56 million. The creditors alleged that negligent, willful, wanton, and fraudulent acts of the officers and employees caused the creditors' losses.

The second claim, filed on January 10, 1984, for $56,433,959.29, was brought on behalf of "a special class of creditors – those certificate of indebtedness holders who have a unique and special claim under the Nebraska Depository Institution Guaranty Corporation Act, Sections 21-17,127 through 21-17,145 R.R.S. Nebr. 1943 (Reissue 1977)." This claim essentially stated the same allegations against the same persons as in the first claim, and made further allegations attacking the constitutionality of Neb. Rev. Stat. § 21-17,141 (Reissue 1987).

The State Claims Board heard these claims on February 13, 1984, and on February 29 adopted a "decision" as to the claims. The decision enunciated that "the Board has decided that there is a strong possibility of some liability on the part of the State of Nebraska arising out of

certain actions of the Banking Department with regard to the Nebraska Depository Institution Guaranty Corporation Act." Based on its deliberations, the board decided that, pursuant to its statutory authority in § 81-8,211 (Reissue 1987), the State should compromise and settle the claims.

It is also provided in § 81-8,211 that any claim settled in an amount of more than $5,000 shall be submitted for approval by the district court for Lancaster County. The claims were thus submitted, and on March 2, 1984, a journal entry was filed by the district court's presiding judge ordering that a three-judge panel decide the matter due to the complexity of the legal issues presented, the public interest in the matter, and the need for a prompt decision by the court. On March 5, one of the judges was excused from service in the case, and the matter proceeded before a two-judge panel.

A hearing was held on March 12 where evidence was adduced and briefs were submitted to the court on the matter of approval of the State Claims Board's proposal of settlement.

On March 16, the district court denied the petition and application seeking approval of the State Claims Board's "decision" of February 29. In its 30-page order, the court determined that it was required to exercise its discretion and was not merely a "rubber stamp" with respect to action of the board, basing this determination on case law and the following portion of § 81-8,211: "The court may deny the application for any legal and sufficient reason, or may direct the State Claims Board to conduct further hearings on any material issues."

The court found that the decision of the State Claims Board

> (1) Is not a compromise, settlement or allowance of a claim and therefore such action is in excess of the Board's authority.
>
> (2) Is unsupported by competent, material and substantial evidence in view of the entire record.
>
> (3) Is based on conclusions of law which are clearly erroneous and unsupported by any evidence in the record to the contrary.
>
> (4) Is arbitrary and capricious.

The court clearly went to great lengths in striving to discharge its duty of making a *legal* determination of whether the board's decision should be approved, as seen in part of the dicta in the court's order:

> Were it within our power to base our approval on moral grounds or on concepts of fundamental fairness, we would not hesitate to do so. However, our decision, as the structure of society as a whole, must rest upon the rule of law. . . . Almost all applicable law is clearly contrary to the position taken by the Receiver. The statutes are clear.
>
> . . . Frankly, we do not and cannot expect the majority of these people [who suffered grievous losses] to understand or appreciate the decision we must make which may appear to be based on legal technicalities. However, we are not free to depart from the law as clearly set forth in applicable statutes and judicial decisions.

Upon the receiver's motion, the matter was remanded to the State Claims Board. On April 2, the receiver filed a miscellaneous (contract) claim with the board. The contract claim essentially alleged that the NDIGC was an agency or instrumentality of the State, and therefore the State should be obligated to pay up to $30,000 on each of the guaranteed accounts at Commonwealth.

On June 12, 1984, the State Claims Board filed an amended petition and application in the district court for Lancaster County. The amended petition stated that on May 25, 1984, the State Claims Board held a further hearing pursuant to duly publicized notice with regard to the receiver's tort and contract claims. The amended petition further stated that the State Claims Board unanimously adopted both a decision and an "Agreement for Compromise of Tort Claim" at a duly publicized open meeting on May 31. This second decision by the board declared that, after considering both claims but without deciding the contract claim, a compromise settlement should be executed in the amount of $33 million. The amended petition and application therefore sought approval of the settlement in the district court, as required by § 81-8,211.

After a hearing on the matter on July 10, 1984, the district court issued a 46-page order on July 27 which denied approval of the board's "decision" of May 31 for the following reasons:

> a. Our conclusions as to the law applicable to this matter are substantially the same as expressed in our prior Order. The law, particularly in light of the decision in *Varig Airlines*

[467 U.S. 797, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984)], is not supportive of the Receiver's position. Therefore, the Receiver's probabilities of success should the claim be litigated are not encouraging.

b. There has been an inadequate showing as to the amount of damages which reasonably may be incurred, particularly in regard to the valuation of the remaining assets of Commonwealth.

c. This proposed settlement, like the prior decision, virtually provides for reimbursement of one hundred percent of the possible loss when the liquidating value of the assets is included. Based on the likelihood of success should the claim be litigated, the Decision of the Board clearly is excessive and is not a fair and reasonable settlement when confronted with the minimal likelihood of liability.

d. The Decision of the Board is based on conclusions of law which are clearly erroneous.

Pursuant to stipulation of the parties filed on October 30, the district court remanded the matter to the State Claims Board for the sole purpose of allowing the receiver to withdraw the claim, pursuant to § 81-8,213 (Reissue 1987), and to file suit on the claim.

The record further shows that the receiver proceeded to file suit against the State of Nebraska on March 20, 1985, in the district court for Lancaster County. The receiver alleged numerous (33) acts of wrongful and negligent conduct by the department in failing to supervise, regulate, and examine Commonwealth, including wrongful and negligent conduct of the department's director in

admitting Commonwealth as a member of the NDIGC. The State's answer generally denied all allegations in the receiver's petition.

On March 29 the parties to the action filed an application for approval of settlement pursuant to § 81-8,218 (Reissue 1987), requesting the court's approval of a compromise settlement of all claims of the plaintiff, holders of all certificates of indebtedness of plaintiff, and all other creditors of plaintiff. Conditions of the settlement included the payment to the receiver of the sum of $8.5 million as a full and complete compromise settlement of any and all claims of the receiver (on behalf of itself and its representatives) against the State, the department, and their past, present, and future officials and employees. A release of all claims by the receiver to be executed upon payment of the $8.5 million accompanied the application.

As the settlement affected the initial district court receivership proceedings wherein Commonwealth was first declared insolvent, the receiver also filed therein, on April 1, 1985, an application requesting that the district court set a hearing date for the application for authority to settle in the receiver's suit against the State and to authorize notice of the hearing to Commonwealth creditors by sending a notice to each creditor by mail, and by publication in a newspaper of general circulation for three consecutive weeks prior to the hearing.

The district court entered orders dated April 1 in each of the aforementioned cases, setting the hearing for April 22 and approving the form and method of notice to the creditors. On April 15, the presiding judge of the

district court for Lancaster County appointed a two-judge panel to consider the matter.

After the hearing, the court entered an order on April 26 that the application for approval of settlement be approved and forwarded to the Legislature for review and the appropriation of funds. In its order, the court found that proper notice had been given to the creditors pursuant to law and the order of the court. The court noted that the substantial majority of creditors who expressed an opinion at or before the hearing were either opposed to the proposed settlement or had reservations concerning the terms of the release or the future actions of the Legislature. The court stated, however, that it could not modify the proposed amount of the settlement or any of its provisions. The court had only the authority to approve or disapprove.

The court said that in reviewing the proposed settlement it adhered to its statement in the prior orders denying the State Claims Board's proposed settlement: " 'Therefore, this court, in exercising its discretion herein must reach a conclusion as to the likelihood of liability on the part of the State, the amount of damages resulting from such liability and whether any proposed settlement is fair, adequate and reasonable to both the claimants and the State.' "

Thus reviewing the matter, the court concluded that the proposed settlement was fair, adequate, and reasonable to both the claimants and the State, and could find no legal or other reason to disapprove it. The court also entered an abbreviated order approving the settlement in the initial Commonwealth matter of insolvency.

The record shows that a state treasury warrant was issued to the receiver in the amount of $8,518,228.09 and that the release was signed on September 26, 1985, by the receiver.

INTERPRETATION OF § 8-199

Appellants assign error to the district court in its interpretation of Neb. Rev. Stat. § 8-199 (Reissue 1983). Statutory interpretation is a matter of law in connection with which this court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Sorensen v. City of Omaha*, 230 Neb. 286, 430 N.W.2d 696 (1988). The general rules governing statutory construction and interpretation provide that in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; this court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. Furthermore, it is not within the province of this court to read a meaning into a statute which is not warranted by the legislative language; neither is it within the province of this court to read anything plain, direct, and unambiguous out of the statute. In construing a statute it is presumed that the Legislature intended a sensible, rather than an absurd, result. *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989).

We find that the plain, direct, and unambiguous language of § 8-199 allows the receiver to enforce "all debts or other obligations of whatever kind or nature due" to

the creditors of the failed institution, including those asserted by the appellants.

This construction is consistent with the role of a corporate receiver:

> A corporate receiver represents not only the corporation, but all its creditors, and as to the latter it is his duty to secure all the assets available for their payment. For this purpose he succeeds to their rights, and has all the powers to enforce such rights that the creditors before his appointment had in their own behalf, even though such powers be beyond those which he has as the representative of the corporation alone.

66 Am. Jur. 2d *Receivers* § 450 (1973).

Appellants contend that they alone can enforce their alleged causes of action, and cite as a proposition of law that the receiver of an insolvent institution may not take possession of property that did not belong to the insolvent institution. Appellants cite *Frederick v. McRae,* 157 Minn. 366, 196 N.W. 270 (1923), in support of this proposition. That case holds that a depositor can have an individual right of action in deceit which could not be brought by the receiver if the bank officers fraudulently accepted deposits while knowing the bank was insolvent. Nebraska law has long recognized that a depositor may have an individual action under this scenario. See, *Higgins v. Hayden,* 53 Neb. 61, 73 N.W. 280 (1897); *Wilson v. Coburn,* 35 Neb. 530, 53 N.W. 466 (1892). However, appellants do not sufficiently state such a cause of action.

We believe that appellants' alleged actions are properly characterized in *In re Sunrise Securities Litigation*, 108 Bankr. 471, 476 (E.D. Pa. 1989):

> In general, "wrongs committed by a bank's officers or directors that injure all depositors and creditors alike create a liability which is an asset of the bank itself and for which only the bank or its receiver may recover." *In re Longhorn Securities Litigation*, 573 F.Supp. 255, 272 (W.D. Okla.1983), *citing Adato v. Kagan*, 559 F.2d 1111, 1117. (2d Cir.1979). Under such circumstances, "[t]he damage to depositors is indirect only and it is generally recognized that for such matters a depositor has no direct and individual right of action against a director." *Michelsen v. Penney*,10 F.Supp. 537, 539 (S.D.N.Y.1934). *See* 1 Michie, *Banks and Banking*, Ch. 3, § 69, at 479 (1986) ("where the amount for which the officers and directors may be liable results from matters affecting all creditors, they constitute assets of the corporation for the benefit of all depositors and creditors, and suit therefor must be brought by the bank or its receiver"). . . .

In re Sunrise Securities Litigation further holds that when a depositor claims to have been defrauded by a misrepresentation or omission in a statement directed to the general public, he or she does not allege a wrong that is distinctly the depositor's and not common to other depositors or creditors, and therefore claims an indirect injury.

Appellants' petition alleges that misrepresentations were made to the general public, not to a single depositor or specific group of depositors. Further, appellants allege that the appellees' willful and negligent actions harmed

all depositors and, in at least one instance, harmed Commonwealth *creditors*. The petition is not even clear whether the Association of Commonwealth Claimants represents all Commonwealth depositors.

Other cases cited by appellants, including *State, ex rel. Sorensen, v. Nebraska State Bank*, 124 Neb. 449, 247 N.W. 31 (1933), *Brownell v. Adams*, 121 Neb. 304, 236 N.W. 750 (1931), and *Rogers v. Selleck*, 117 Neb. 569, 221 N.W. 702 (1928), affirm the acts of the respective receivers in enforcing causes of action on behalf of creditors and are not supportive of appellants' contention that they distinctly own their alleged causes of action.

We therefore find that the appellants have not alleged an individual harm, but that their claims are derivative and clearly are properly pursued by the receiver under § 8-199.

The appellants also challenge the constitutionality of § 8-199, alleging that it denies access to the courts, deprives appellants of due process, and takes property of citizens for a public purpose without just compensation. In *Department of Banking v. Hedges*, 136 Neb. 382, 286 N.W. 277 (1939), this court upheld the constitutionality of a receivership procedure under predecessor statutes which allowed the Department of Banking and its superintendent to bring actions on behalf of creditors. Therein we stated:

> In 9 C.J.S. 170, sec. 88, it is said:
>
> "However, unless the Constitution specifically prescribes and limits the persons by whom such actions may be brought, it is within

> the power of the legislature to authorize particular persons to sue, and statutes conferring such authority have been sustained. Further, since such legislation is procedural, and since methods of procedure which do not affect the substantial rights of the parties are within the control of the legislature where no new right is created nor any penalty imposed, a statutory change as to the person who may enforce the liability may apply to stockholders who became such before its enactment as well as to those who became such thereafter. . . . "
>
> . . . .
>
> In *Luikart v. Bunz*, [125 Neb. 867, 252 N.W. 473 (1934)], the effect of the decision is: " . . . No vested rights are impaired by statutory or constitutional provision which creates a remedy for an existing right."

Hedges, supra at 393-94, 286 N.W. at 284.

We have also more recently held that, in regard to obtaining a remedy through the courts, article 1, § 13, of the Nebraska Constitution is not violated when one party brings an action on another's behalf. See, e.g., *Pullen v. Novak*, 169 Neb. 211, 99 N.W.2d 16 (1959) (guardian or next friend may sue on behalf of infants to recover damages done to their person or property by tortious acts of another). Likewise, we hold that § 8-199 merely imposes a procedural remedy which does not affect the substantial rights of the parties, and therefore does not unconstitutionally deny appellants access to the courts.

Regarding the due process challenge, both appellants and appellees cite *Rein v. Johnson*, 149 Neb. 67, 30 N.W.2d 548 (1947), *cert. denied* 335 U.S. 814, 69 S. Ct. 31, 93 L. Ed.

369 (1948). That case sets forth the following on due process:

> The primary purpose of that constitutional guaranty is security of the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice. 12 Am. Jur., Constitutional Law, § 575, p. 271.
>
> As related to legislation, it is generally held that due process is satisfied if the Legislature had the power to act on the subject matter, if that power was not exercised in an arbitrary, capricious, or unreasonably discriminatory manner, and if the act, being definite, had a reasonable relationship to a proper legislative purpose. In other words, if an act of the Legislature is authorized and promulgated by the inherent and reserved constitutional powers of the state, and is enforced with due regard to and observance of the rules established by our system of jurisprudence for the security of life, liberty, and property, it is not in conflict with due process of law. 16 C.J.S., Constitutional Law, § 569, p. 1156.

Rein, supra at 82, 30 N.W.2d at 557-58.

As our previous discussion shows, the Legislature clearly had the power to enact § 8-199 as a procedural remedy. Further, the statute has a reasonable relationship to the receiver's purpose of wrapping up the business of the insolvent institution and treating all creditors equitably and fairly. The statutory scheme of a receivership seeks to avoid preferences among creditors, to avoid a multiplicity of lawsuits and races to the courthouse, and to give the receiver meaningful authority to pursue

claims, negotiate compromise settlements, and execute binding releases. Finally, in granting the receiver broad authority to enforce claims on behalf of not only the failed institution but of shareholders and *all* creditors in order to accumulate all possible assets, the power of the Legislature was exercised in neither an arbitrary, capricious, nor unreasonably discriminatory manner. We therefore find that § 8-199 satisfies due process requirements.

Lastly, we find no merit in appellants' argument that § 8-199 allows an unconstitutional taking. We have determined that § 8-199 allows the receiver to enforce the appellants' causes of action. Simply stated, appellants' "property" is not being taken without compensation, but, rather, the enforcement of those rights is given to the receiver (pursuant to the Legislature's power to do so) in order to secure compensation for all creditors in an equitable and nonpreferential manner.

We therefore find no merit in appellants' constitutional challenges to § 8-199.

DEFENDANTS AMEN AND LAKE

There is no dispute that Amen and Lake, as department employees, were properly made defendants in the receiver's suit against the State and in the case at bar. The receiver's petition in its action against the State makes 33 separate allegations of "*wrongful* and negligent conduct of the Department, its Director and its employees," which necessarily encompass the appellants' causes of action against Amen and Lake. The appellants merely contend that they, and not the receiver, are the proper parties to

bring their causes of action. Such contention, as we have stated, is without merit.

Appellants also assign error to the district court in accepting a release signed by the receiver as a bar to this action. The receiver's ability to settle or compromise any doubtful debts is enumerated in § 8-199 and Neb. Rev. Stat. §§ 8-1,103 and 8-1,104 (Reissue 1983). The receiver's ability to settle a doubtful debt has also been upheld by this court. See *State v. German Savings Bank*, 65 Neb. 416, 91 N.W. 414 (1902). After going through the State Claims Board and having a proposed settlement rejected twice, the receiver clearly saw this claim as a doubtful debt and therefore entered into a compromise settlement in its claim against the State. Further, the receiver is empowered, under § 8-199, to "make, execute, and deliver any and all . . . instruments necessary and proper to effectuate . . . the settlement of any obligations. . . ." The same power specifically stating "releases" is also granted in § 8-1,103. Section 81-8,223 (Reissue 1987) provides that an award in a state tort claim shall constitute a complete release by the claimant of any claim against the State and against the employee of the State whose act or omission gave rise to the claim, by reason of the same subject matter. The receiver was therefore within its statutory authority in executing the release as a necessary and proper instrument to effectuate the settlement.

Summary judgment is proper when the pleadings, depositions, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from the material facts, and the moving party is entitled to judgment as a matter of law. *Peterson v. Don Peterson &*

Assoc. Ins. Agency, 234 Neb. 651, 452 N.W.2d 517 (1990); *John v. 00 (Infinity) S Development Co.,* 234 Neb. 190, 450 N.W.2d 199 (1990). In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Peterson, supra; John, supra.*

Viewing the evidence in a light most favorable to appellants, our conclusion remains that the receiver acted at all times within its statutory authority and that Amen and Lake, by virtue of the release, were entitled to summary judgment as a matter of law.

REMAINING DEFENDANTS

The district court sustained the remaining defendants' demurrers on the basis that the plaintiffs were not the real party in interest and therefore lacked the capacity to bring suit. See Neb. Rev. Stat. § 25-806 (Reissue 1989).

In reviewing an order sustaining a demurrer, this court accepts the truth of facts well pled and the factual and legal inferences which reasonably may be deduced from such facts, but does not accept conclusions of the pleader. *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.,* 234 Neb. 789, ___ N.W.2d ___ (1990); *Meyerson v. Coopers & Lybrand,* 233 Neb. 758, 448 N.W.2d 129 (1989); *S.I.D. No. 272 v. Marquardt,* 233 Neb. 39, 443 N.W.2d 877 (1989). In ruling on a demurrer, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled. *Meyerson, supra; S.I.D. No. 272, supra.*

We have determined that appellants' actions are derivative and that they have not suffered individual harm upon which they can sue directly. Their actions are properly brought by the receiver. However, the record shows that the receiver sued only the State of Nebraska, the department, and its employees. If the appellants in fact state a cause of action against the NDIGC or other defendants, this leaves Commonwealth, its creditors, and its depositors with a claim which the receiver failed or neglected to pursue.

The liability of the NDIGC and the State toward the depositors was alleged in the second claim brought before the State Claims Board by the receiver. This raises the question of whether the NDIGC is an agency of the State; for if it is, it would be free of liability by virtue of the release executed by the receiver. The State Tort Claims Act, § 81-8,210(1) (Reissue 1987), says that for the purposes of the act: "State agency shall include all departments, agencies, boards, bureaus, and commissions of the State of Nebraska, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the State of Nebraska, but shall not include corporations that are essentially private corporations."

The Nebraska Depository Institution Guaranty Corporation Act, Neb. Rev. Stat §§ 21-17,127 et seq. (Reissue 1987), lists four purposes of the act in § 21-17,128. One of those purposes involves a duty of the department "[t]o assist in the detection and prevention of depository institution insolvencies or liquidations," while the other purposes relate solely to the objectives and operations of the corporation. In § 21-17,132 the act gives the corporation all powers granted to nonprofit corporations (which are

not state agencies) as provided in Neb. Rev. Stat. ch. 21, art. 19 (Reissue 1987). Sections 21-17,134 and 21-17,136 indicate that the department acts in a supervisory or regulatory role toward the NDIGC, just as it does with all chartered financial institutions – most of which are private corporations. The NDIGC is formed by private financial institutions, and the members of its board of directors must be officers of those institutions. See §§ 21-17,132 and 21-17,133. The corporation is operated neither by state employees nor at the direction of state government.

An examination of the legislative history of the act shows that the corporation was not intended to be an arm or instrumentality of the State. Testimony on 1976 Neb. Laws, L.B. 948 (the provisions of which would eventually become the NDIGC act), was presented at a hearing before the Banking Committee. James Moylan, a proponent of the bill, stated:

> I think if you want to take the Banking Department and then show the areas that it operates in, it will be banks, industrials, credit unions, savings and loans and right along beside it will be the guaranty corporation. And their relationship to it will be conducted pretty much by this act when you get over to the Banking Act, it's this way with banks; it's this way with credit unions; it's this way with savings and loans; so, it would be another institution that they would have.

Banking Committee Hearing, L.B. 948, 84th Leg., 2d Sess. 25 (Jan. 27, 1976).

Charles Aron of the department stated: "It is our understanding of the concept of this type of a corporation

to basically insure the deposits in the credit unions with this as a complement to the supervision done by the Department of Banking not in lieu of supervision." *Id.* at 29.

> Further, William Riley, director of the department, stated:
>
> [T]he Department is not looking to this type of legislation to make our job a [sic] regulation and supervision of both credit union and cooperatives easier for us. . . .
>
> . . . .
>
> . . . Well, I guess the feeling that I don't want to give this committee because I've demonstrated it to the credit unions, is that we are not using this as an arm for better supervision and regulation.

Id. at 31, 33.

Based on our reading of the act and its legislative history (in particular the foregoing statements), we conclude and find that the NDIGC is an "essentially private" corporation and is not an instrumentality or agency of the State of Nebraska. Consequently, appellants have stated a cause of action at least against the NDIGC based on statutory and common-law contractual liability toward Commonwealth and its depositors.

Although the receiver was the proper party to enforce that liability, the appellants are not left without a remedy in this situation. While § 8-199 gives the receiver broad authority to enforce claims on behalf of the bank, its shareholders, and creditors, we find that the shareholders and creditors must be afforded relief when the

receiver fails or neglects to enforce a claim. Therefore, in remaining consistent with general corporate law and the federal common law, we hold that a depositor may bring a derivative action to recover for wrongs against the bank or financial institution, which wrongs have indirectly injured depositors, but only after having made an unsuccessful demand on the bank or its receiver to bring suit. See, *In re Sunrise Securities Litigation*, 108 Bankr. 471 (E.D. Pa. 1989); *Landy v. Federal Deposit Insurance Corporation*, 486 F.2d 139 (3d Cir. 1973); *Michelsen v. Penney*, 10 F. Supp. 537 (S.D.N.Y. 1934).

In order for appellants to state a derivative action, their petition must allege the fact that a demand has been made on the receiver or that such a demand would be futile. The petition makes no such allegation, thereby failing to allege facts sufficient to constitute a cause of action. Consequently, we affirm the action of the trial court in sustaining the demurrers, but for the reason set forth above. See *Grone v. Lincoln Mut. Life Ins. Co.*, 230 Neb. 144, 430 N.W.2d 507 (1988) (where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the Supreme Court will affirm).

The defense of the statute of limitations is raised by way of cross-appeal or otherwise in the briefs of certain appellees. However, as the district court made no ruling on this issue, we decline to express an opinion on the matter at this time and leave to the trial court the propriety of this defense and any others that may arise after the appellants are given an opportunity to amend their petition.

The order in case No. 88-430 granting summary judgment to defendants Amen and Lake is affirmed. In case No. 88-652, we affirm the order of the trial court in sustaining the demurrers, but reverse that part of the trial court's order dismissing the petition and remand this cause with directions to allow the appellants to amend their petition.

AFFIRMED IN PART, AND IN PART
REVERSED AND REMANDED
WITH DIRECTIONS.

APPENDIX J

UNITED STATES DISTRICT COURT

NEBRASKA DISTRICT

CLAUDE T. WEIMER, et al., Plaintiffs-Appellants	)	CV. No. 86-L-248
vs.	)	NOTICE OF APPEAL
PAUL AMEN, et al., Defendants-Appellees	)	(Filed Sep. 24, 1987)

Notice is herey [sic] given that Claude T. Weimer and the Association of Commonwealth Claimants, Plaintiffs, appeal to the United States Court of Appeals for the Eighth Circuit from the final judgment of dismissal of the Complaint entered in this action August 28, 1987.

CLAUDE T. WEIMER
ASSOCIATION OF
COMMONWEALTH CLAIMANTS

Plaintiffs-Appellants

By: /s/ Robert R. Gibson

Robert R. Gibson, Bar No. 11491
PROFESSIONAL LEGAL
ASSOCIATES OF NEBRASKA, p.c.
740 South 17th Street
Lincoln, NE 68508
Telephone: (402) 474-1440

APPENDIX K
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2331

Claude T. Weimer, for himself; and Association of Commonwealth Claimants, an unincorporated association,

Appellants,

v.

Paul Amen; S. E. Copple; Marvin Copple; Members of the Nebraska Depository Institution Guaranty Corporation; Commercial Savings of Columbus, Inc., Employer of Ken Wellman; First Savings Company, Employer of William Beckman; First National Bank, Owner of First Savings Co. of Grand Island, Norwest Corporation, Owner of First National Bank, Grand Island; Commerce Group, Inc., Owner of Commercial Savings of Columbus, Inc., and Commerce Savings Lincoln, Inc., Commerce Savings Lincoln, Inc., Employer of Douglas Alford; Provident Federal Savings Bank, Owner of Liberty Savings

CV. 86-L-248

Appeal from the United States District Court for the District of Nebraska.

(Filed Nov. 20, 1989)

Company; State Security Savings *
Company, Employer of Alfred *
Adams and Kenlon Hake; *
American State Savings Company, *
Employer of Roy Ashcraft; Federal *
Deposit Insurance Corporation; *
American Savings Company, *
Employer of Darrell Anderson; *
Commerce Savings Scottsbluff, Inc., *
Employer of Tim Spoeneman; *
Liberty Savings Company, *
Employer of Dennis Applebee; *
Moramerica, Owner of American *
Savings Company, Omaha; Marvin *
Copple, Director, N.D.I.G.C., and *
officer of Commonwealth, from *
before 1975 until after November *
1, 1983; S. E. Copple Director, *
N.D.I.G.C., and officer of *
Commonwealth from 1975 until *
after November 1, 1983; Ken *
Wellman; William Beckman; *
Douglas Alford; Alfred Adams; *
Kenlon H. Hake; Roy Ashcraft; *
Darrell Anderson; Tim Spoeneman; *
Dennis Applebee; *
*
Appellees. *

Filed: November 15, 1989

ORDER

The order of the district court in this case relied upon the single scheme theory in dismissing the complaint, and

the briefing of the parties was centered on that issue. The Supreme Court in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893 (1989), held that this circuit's single scheme theory was in error. As the entire thrust of the litigation to this point has been on this discredited issue, we are satisfied that the most desirable course is to remand this case to the district court for further consideration in light of *H.J. Inc. v. Northwestern Bell Tel. Co.* The district court should certify any order on the motion to dismiss to this court and this panel will retain jurisdiction for further proceedings.

A true copy.

Attest: /s/ Robert D. St. Vrain

CLERK U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX L

professional
legal
associates of
nebraska p.c.

Robert R. Gibson - Telephone (402) 474-1440

May 21, 1990

Hon. Lyle Strom
U.S. District Judge
P.O. Box 607
Omaha, NE 68101

RE: Weimer et al., vs. Amen et al.,
CV 86-L-248

Dear Judge Strom:

Enclosed is a copy of a Motion For Rehearing filed May 17, in the Nebraska Supreme Court. The Appellants' Brief In Support of the Motion will be filed no later than June 7, 1990. The Appellees' Brief in Response will be due June 27.

The Defendants have requested that you rule in their favor on the basis of the Nebraska Supreme Court opinion provided to you by the Attorney General. In light of our Motion For Rehearing, a ruling on these requests would be premature.

In addition, the Supreme Court opinion gives rise to three (3) issues that will have to be resolved concerning

standing of the Plaintiffs to maintain this RICO action. These issues are as follows:

1. Whether the RICO claims expressed in this lawsuit are "derivative" claims of the kind held by the Supreme Court to have been transferred to Commonwealth's Receiver under § 8-199, R.R.S. Neb. 1943;
2. Whether the Receiver failed to respond to a demand by the Plaintiffs to pursue this cause of action against the Defendants; and
3. Whether it would have been futile for the Plaintiffs to demand pursuit of this action by the Receiver.

The Supreme Court held only that the state court action stated a "derivative claim" within the reach of §8-199, R.R.S. Neb. 1943. The Plaintiffs are prepared to demonstrate in a proper proceeding that this RICO action is not and legally cannot be a derivative action.

The Supreme Court also ruled that even if a claim is assigned by statute to the Receiver, the creditors have standing to maintain the action if (a) the Receiver has failed to bring the action after a proper demand, or (b) it would have been futile for the creditors to make demand upon the Receiver to bring the action.

The Plaintiffs are prepared to offer evidence in a proper proceeding that demand was made upon the Receiver to file this action, to no avail; and that in any event, the Receiver was so unwilling to pursue any action against the Defendants that any demand would have been futile.

Finally, the Plaintiffs contend that the legislature of Nebraska is without authority to limit or foreclose the rights of the Plaintiffs to pursue an action in United

States Courts under United States statutes. Accordingly, state law concerning standing to sue in state courts DOES NOT affect the Plaintiffs' standing to sue in this action.

The Plaintiffs plan to file within a short time, a Motion For Partial Summary Judgment that the Plaintiffs have standing to maintain this action. If this Motion is sustained, the Court could then proceed to decision on other pending questions. If it is overruled, Plaintiffs' intend to seek leave to amend their Complaint to make factual allegations about demands made upon the Receiver and the futility of such demands. In either event, the issues enumerated in this letter have not been argued or briefed. Plaintiffs will appreciate the Court's direction as to how this should be accomplished.

Very truly yours,

/s/ Robert R. Gibson
Robert R. Gibson

Encs.
cc. Defendants' counsel
ACC

APPENDIX M

UNITED STATES DISTRICT COURT
NEBRASKA DISTRICT

CLAUDE T. WEIMER, ET AL.,	)	
vs.	)	CV 86-L-248
PAUL AMEN, ET AL.,	)	

****

MOTION FOR RELIEF FROM JUDGMENT

****

The Plaintiff, ASSOCIATION OF COMMONWEALTH CLAIMANTS (ACC), requests relief from the Court's judgment of August 24, 1990, in accordance with Federal Rule of Civil Procedure 60, as follows:

1. By withdrawing the Order and granting to ACC an opportunity to amend its Complaint;

2. By withdrawing the order and adding to it the Court's ruling on the original question certified by the United Stated [sic] Court of Appeals.

Respectfully submitted,

ASSOCIATION OF COMMONWEALTH CLAIMANTS, Plaintiff

BY: /s/ Robert R. Gibson
ROBERT R. GIBSON, Bar No. 11491
PROFESSIONAL LEGAL ASSOCIATES
OF NEBRASKA, P.C.
P.O. BOX 80826
LINCOLN, NE 68501-0826
402-474-1440

APPENDIX N

UNITED STATES DISTRICT COURT
NEBRASKA DISTRICT

CLAUDE T. WEIMER, ET AL.,	)	
	)	CV 86-L-248
vs.	)	
	)	
PAUL AMEN, ET AL.,	)	

****

BRIEF IN SUPPORT OF MOTION
FOR RELIEF FROM JUDGMENT

****

The Unites [sic] States Court of Appeals for the Eighth Circuit remanded this action for further consideration of this Court's original order dismissing the Complaint in light of the decision of the United States Supreme Court in *H.J. Inc., vs. Northwestern Bell,* 109 S.Ct. 2993 (1989), about the meaning of "pattern of racketeering activity".

On August 24, 1990, this Court entered an order dismissing the Complaint for lack of standing on the ground that Nebraska's Supreme Court has ruled that causes of action such as those of the Plaintiff belong to the Receiver of Commonwealth Savings Company.

ARGUMENT

I. PLAINTIFF SHOULD HAVE BEEN GIVEN AN OPPORTUNITY TO AMEND THE COMPLAINT.

The Court in its opinion at page 6 states as follows:

"As in the present action, plaintiffs' state court petition alleged numerous improprieties in the

> management and supervision of the Commonwealth Savings Company. The Nebraska Supreme Court affirmed the trial court's summary judgment stating, 'we have determined that appellants' actions are derivative and that they have not suffered individual harm upon which they can sue directly. Their actions are properly brought by the receiver.' "

In fact, the Complaint does refer to mismanagement of Commonwealth but the RICO violation that is alleged in the Complaint is based upon mismanagement of NDIGC or more accurately, the ENTERPRISE defined as an association in fact between NDIGC and the State of Nebraska. Therefore, the rationale of the Nebraska Supreme Court does not apply.

The injury to ACC's assignors addressed in the Complaint is not the actual losses of depositors due to Commonwealth's insolvency, but the losses of depositors due to NDGIC's default on its guaranties. The fact that insolvency of Commonwealth is one proximate cause of damage to depositors does not preclude redress for another proximate cause: The default by NDIGC.

Moreover, the Nebraska Supreme Court remanded the state case with directions to the trial court to permit amendment of the Petition. This amendment permits the ACC to show that the Receiver failed or refused to act upon the demands of ACC's assignors, or that such demands would be futile, so that ACC's assignors would have standing to proceed with their own derivative causes of action. ACC at a minimum should be given such an opportunity in this case.

II. THE OMISSION OF A RULING ON THE QUESTION WHETHER THE COMPLAINT IS SUFFICIENT TO ALLEGE A PATTERN OF RACKETEERING ACTIVITY WILL RESULT IN ADDITIONAL DELAY.

In the event the Court of Appeals agrees that the Complaint should not have been dismissed for lack of standing, it will need against [sic] to certify this case back to the District Court for a finding on the question of pattern of racketeering activity. This action already has been pending some four (4) years, in which time ACC has not yet had an opportunity even to commence discovery. Much of this time has elapsed to await a ruling of the U.S. Supreme Court in *H.J. Inc, supra,* on "pattern of racketeering activity". This action specifically was sent back from the appellate court for a resolution of the "pattern" issue.

ACC respectfully requests a statement from the Court on this issue so that further action in the Court of Appeals can dispose of all issues in one hearing and one briefing.

Respectfully submitted,

ASSOCIATION OF COMMONWEALTH CLAIMANTS, Plaintiff,

BY: /s/Robert R. Gibson
ROBERT R. GIBSON, Bar No. 11491
PROFESSIONAL LEGAL ASSOCIATES
OF NEBRASKA, P.C.
P.O. BOX 80826
LINCOLN, NE 68501-0826
402-474-1440

UNITED STATES DISTRICT COURT
NEBRASKA DISTRICT

CLAUDE T. WEIMER, ET AL.,	)	
vs.	)	CASE NO.
	)	CV 86-L-248
PAUL AMEN, ET AL.,	)	

****

CERTIFICATE OF SERVICE

****

Copies of the Motion For Relief From Judgment and the Brief in Support of the Motion were mailed on September 14, 1990, to the following attornies [sic]:

GARY DOLAN
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1500 Woodmen Tower
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/s/ Robert R. Gibson
Robert R. Gibson

APPENDIX O

UNITED STATES DISTRICT COURT
NEBRASKA DISTRICT

CLAUDE T. WEIMER, ET AL.,	)	CV 86-L-248
vs.	)	ORDER
PAUL AMEN, ET AL.,	)	(Filed Sep. 28, 1990)

This matter is before the Court on plaintiffs' motion pursuant to Fed. R. Civ. P. 60, (Filing No. 175) for relief from this Court's order of August 25, 1990 (Filing No. 174), dismissing plaintiffs' second [sic] amended complaint for lack of standing and certifying the finding [to] the United States Court of Appeals for the Eighth Circuit.

Having reviewed plaintiffs' motion and the accompanying brief in support thereof, the Court concludes that plaintiffs' motion should be denied. Jurisdiction of this Court [sic] still resides with the Court of Appeals, and this Court's power is limited to certifying to the Court of Appeals its further decision. Accordingly,

IT IS ORDERED that plaintiffs' motion for relief is denied.

DATED this 28th day of September, 1990.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM, Chief Judge
United States District Court

APPENDIX P

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 87-2331NE

Claude Weimer, et al.,	*	
	*	
Appellants,	*	Appeal from the United
	*	States District Court for
vs.	*	the District of Nebraska
	*	
Paul Amen, et al.,	*	
	*	
Appellees.	*	

The Court has received a copy of the district court's August 24, 1990 order on remand. The parties are hereby directed to file supplemental briefs addressing the district court's order. These briefs shall not exceed fifteen (15) pages and shall be filed by October 12, 1990.

September 19, 1990

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX Q

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

CASE NO. 87-2331-NE

CLAUDE T. WEIMER and ASSOCIATION OF COMMONWEALTH CLAIMANTS,
Appellants

vs.

PAUL AMEN, ET AL.,
Appellees

APPELLANTS' PETITION FOR REHEARING

ROBERT R. GIBSON
PROFESSIONAL LEGAL ASSOCIATES
OF NEBRASKA, P.C.
P.O. BOX 80826
LINCOLN, NE 68501-0826
402-474-1440

Attorney For Appellants

TABLE OF CONTENTS

	PAGE
ISSUES	01
STATEMENT OF THE CASE	01
ARGUMENT	03
APPELLATE COURT DECISION	03
DISTRICT COURT'S ORDER	03
AMENDED COMPLAINT	05
INJURY TO COMMONWEALTH DEPOSITORS	07
MISMANAGEMENT OF COMMONWEALTH SAVINGS CO.	08
CONCLUSION	09
PROOF OF SERVICE	10
APPENDIX	11
EIGHTH CIRCUIT PANEL OPINION	11
U.S. DISTRICT COURT ORDER	14

ISSUES

The only issue presented is whether the hearing panel misapprehended the facts upon which the decision was based.

This action was dismissed on the stated ground that depositors of an insolvent bank have no standing to maintain a derivative action against bank officers and directors, for mismanagement which caused the bank to become insolvent.

The facts that were misapprehended are as follows:

A. This action is NOT against former officers and directors of an insolvent bank; and

B. This action is NOT for mismanagement of a bank; and

C. This action is NOT based on a bank's insolvency, or any other injury to a bank.

The stated ground for dismissal has no application to the facts of this case.

STATEMENT OF THE CASE

The Appellants are Claude T. Weimer and the Association of Commonwealth Claimants (ACC). Weimer was a depositor in Commonwealth Savings Company, an insolvent financial institution.[1] ACC is an unincorporated

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[1] Weimer died during the pendency of this appeal. No party has been substituted for him to date.

association formed to pursue claims of Commonwealth depositors. ACC is the assignee of 2,650 depositors.

Before its insolvency, Commonwealth was a member institution of the Nebraska Depository Institution Guaranty Corporation (NDIGC). NDIGC was a state attempt to emulate the FDIC. NDIGC provided guaranties of deposit accounts in member institutions.

This action is against two (2) classes of defendants:

A. Persons who were officers or directors of NDIGC; and

B. NDIGC member institutions, who were the corporate employers of defendants that served as NDIGC directors.

This action is brought under the RICO Act, alleging a pattern of racketeering activity in the Defendants' management of NDIGC, which is the RICO enterprise.

The U.S. District Court originally dismissed the Amended Complaint on the ground that it alleged only a single scheme. While that decision was pending on appeal, the United States Supreme Court, in another case, overturned the Eighth Circuit rule requiring "multiple schemes" in RICO cases. Accordingly, this case was remanded to the District Court for further proceedings.

The District Court then dismissed the case on the ground that Weimer and ACC lacked standing to sue, and returned the case to this Court. On January 22, 1992, a hearing panel of this Court affirmed the District Court's order of dismissal. The opinions of the District Court and this Court are appended at the back of this Petition for Rehearing.

ARGUMENT

The Court of Appeals has affirmed and adopted an order of the District Court. The opinion of the District Court is based on a characterization of the facts that is plainly and unquestionably wrong.

THE APPELLATE COURT DECISION

The decision that is the subject matter of this Petition for rehearing affirmed the order of the District Court "on the basis of the district court's carefully reasoned order".

THE DISTRICT COURT'S ORDER

The order of the District Court cites a series of cases for the proposition that causes of action for wrongdoing by officers of a failed bank belong to the receiver of the bank, and may not be brought by creditors, depositors or shareholders. The District Court goes on to say the following:

> "An individual depositor may bring a derivative action to recover for wrongs against the bank or thrift which have indirectly injured the plaintiff and other depositors 'but only after having made an unsuccessful demand on the bank or its receiver to bring suit'. *In re Sunrise Securities Litigation*. . . . In the present action, plaintiffs do not allege an unsuccessful demand on the receiver to bring suit."

Finally, the District Court referred to a parallel state court case, *Weimer vs. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990). The District Court stated the following:

> **"As in the present action, plaintiffs' state court petition alleged numerous improprieties in the management and supervision of the Commonwealth Savings Co. . . . .**
>
> * * *
>
> As it appears beyond doubt that plaintiffs cannot prove they have suffered an individual injury distinct from any injury to Commonwealth, they lack standing to maintain this suit."

There can be no doubt from the above quotations that the District Court treated the Amended Complaint as if it stated a suit against Commonwealth officers for wrongful management of Commonwealth Savings Co. resulting in injury to Commonwealth.

This perception of the District Court is patently wrong. The Amended Complaint states claims against directors of NDIGC, but not against officers of Commonwealth Savings Co. The Amended Complaint states claims for fraudulent acts of NDIGC directors in their management of NDIGC, but not for anyone's management of Commonwealth Savings Co. The Amended Complaint states a claim for injuries to people who relied upon fraudulent representations addressed to them, but not for any injury to Commonwealth Savings Co. No injury to Commonwealth by the defendants is even implied, much less alleged. No Commonwealth officer, director, or employee is even a party to the lawsuit.

In short, the causes of action in the Amended Complaint are not in any way derivative claims for indirect injuries. The rule of law relied upon by the District Court is irrelevant to this lawsuit.

THE AMENDED COMPLAINT

An examination of the Amended Complaint demonstrates conclusively that the District Court mischaracterized the facts. The nature of this case is clearly stated on the first and second pages of the Amended complaint (R. 181, 182), as follows:

> "This Amended Complaint alleges violations of . . . RICO. . . . The Complaint describes participation by the Defendants in a series of schemes. . . . **The Defendants executed these schemes in their conduct of the affairs of the Nebraska Depository Institution Guaranty Corporation (NDIGC)** through patterns of racketeering activity. The schemes involved conspiracies of Defendants . . . **to obtain money from Plaintiffs and others by false representations and by withholding material facts.**"

The Amended Complaint identifies the Defendants as **"Directors of the NDIGC"**. The Directors are also alleged to be the chief executive officers of various NDIGC member institutions, and for that reason those member institutions are named as Defendants, as well. (R. 184-186). The Amended Complaint identifies the RICO enterprise as the NDIGC (R. 187), and alleges several schemes, or episodes, of racketeering **activity by the NDIGC directors in their management of the enterprise, NDIGC**. (R. 187-207).

The alleged racketeering activity included acts of mail fraud and wire fraud, in furtherance of the following:

A. The publication and advertisement of "false guaranties", i.e., false representations about

the ability of NDIGC to make good on its guaranty of deposit accounts in member institutions;

B. The siphoning of money from the NDIGC guaranty fund, thereby exacerbating the insufficiency of the fund; and

C. Concealment of the above schemes to prevent their discovery by law enforcement officials and the general public.

INJURY TO COMMONWEALTH DEPOSITORS

The Amended Complaint does not alleges [sic] injury to Commonwealth Savings Co. On the contrary, the Amended Complaint alleges benefit to Commonwealth Savings Co. at the expense of depositors. The alleged injury was direct injury to depositors due to the racketeering activity of the Defendants in the following ways:

A. Commonwealth Savings Co. was essentially insolvent when it was admitted to membership in the NDIGC, although this fact was not known to depositors;

B. The Defendants knew that Commonwealth Savings Co. was insolvent, but wanted to conceal this information;

C. The Defendants also knew the NDIGC guaranty fund was insufficient to make good on Commonwealth Savings Co. deposit guaranties, but wanted to conceal this information.

D. The Defendants falsely represented to the public (including Commonwealth depositors) (1) that Commonwealth Savings Co.

was solvent, and (2) that NDIGC guaranties made it safe to deposit money in Commonwealth Savings Co.

E. When Commonwealth Savings Co.'s insolvency could no longer be concealed, and depositors were unable to claim their deposits with Commonwealth, the depositors turned to NDIGC for reimbursement under the guaranties. NDIGC could not make good on the guaranties and itself ceased to function.

F. Commonwealth depositors would not have left their money with Commonwealth Savings Co., but for the Defendants' false representations about Commonwealth solvency, and about deposit guaranties.

G. Commonwealth depositors would have been reimbursed by NDIGC but for diminution of the guaranty fund, and dissolution of NDIGC. (R. 188, 189; 190, 191; 192; 196; 197; 200; 205-207; 212, 213).

MISMANAGEMENT OF COMMONWEALTH SAVINGS CO.

There was mismanagement of Commonwealth Savings Co. by its officers and that mismanagement caused the insolvency of Commonwealth Savings Co. See R. 206, paragraphs H., I.

However, these facts are alleged in this case ONLY to show that the Defendants **had knowledge** of the mismanagement of Commonwealth Savings Co., and chose to conceal the mismanagement. See R. 203, paragraph 3; R. 204, paragraph 3.

The Amended Complaint does NOT allege mismanagement of Commonwealth Savings Co. by the Defendants. The Defendants were NOT officers or directors of Commonwealth Savings Co.[2], and could not have mismanaged it because they did not manage it at all. Moreover, the Defendants could not have injured Commonwealth by inducing more deposits in Commonwealth Savings Co.

CONCLUSION

The decision of this Court adopts and affirms an Order of the District Court. The District Court order is based upon a patently incorrect characterization of the facts alleged in the Amended Complaint. The Nebraska district Court order should be reversed, and the decision of this Court should be revised accordingly.

Respectfully submitted,

CLAUDE T. WEIMER and ASSOCIATION OF COMMONWEALTH CLAIMANTS, Appellants

BY: /s/ Robert R. Gibson
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Lincoln, NE 68508-0826
402-474-1440

---

[2] Commonwealth Savings Company officers, S.E. Copple and Marvin Copple were originally defendants, but were dismissed due to their bankruptcies. The Copples were not sued as officers of Commonwealth Savings Co., but instead were sued as directors of NDIGC.

UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

CLAUDE T. WEIMER and ASSOCIATION OF COMMONWEALTH CLAIMANTS, Appellants,	)	CASE NO. 87-2331-NE
vs.	)	
PAUL AMEN, ET AL., Appellees,	)	

****

PROOF OF SERVICE

****

The undersigned certified that two (2) copies of the Appellants' Petition For Rehearing was mailed by first class, prepaid, U.S. mail on February 4, 1992, to the attached list.

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APPENDIX R

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 87-2331NEL

Claude R. Weimer, etc., et al.,	*	
Appellants,	*	Appeal from the United States District Court for the District of Nebraska
v.	*	
Paul Amen, et al.,	*	
Appellees.	*	

Appellant's petition for rehearing has been considered by the Court and is denied.

February 24, 1992

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX S

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEBRASKA

CLAUDE T. WEIMER, For Himself; and ASSOCIATION OF COMMOMWEALTH CLAIMANTS, An Unincorporated Association;	)	CASE NO. 86-L-248
Plaintiffs,	)	
vs.	)	
PAUL AMEN; S.E. COPPLE; MARVIN COPPLE; and MEMBERS OF THE NEBRASKA DEPOSITORY INSTITUTION GUARANTY CORPORATION; ET AL.;	)	
Defendants.	)	

AMENDED COMPLAINT
(Filed Apr. 27, 1987)

PREFACE

This Amended Complaint alleges violations of the Racketeer Influenced and Corrupt Organizations Act, 84 Stat. 941 (RICO), and breaches of duties arising under the law of Nebraska. The Complaint describes participation by the Defendants in a series of schemes (1) to protect the Defendants from financial losses, and (2) to enhance their profits by attracting deposits and investments in various Nebraska Industrial Loan companies (Industrials). The Defendants executed these schemes in their conduct of

the affairs of the Nebraska Depository Institution Guaranty Corporation (N.D.I.G.C.)

PARTIES

2. Weimer is a citizen and resident of the City of Lincoln, Nebraska.

3. A.C.C. is an unincorporated association in the City of Lincoln, Nebraska, and is the assignee of claims of the owners of passbook savings accounts, certificates of indebtedness, money market accounts, individual retirement accounts, pension and welfare funds, trust accounts, promissory notes, capital notes, and uncollected checks of Commonwealth Savings Company of Lincoln, Nebraska (Commonwealth), and of general creditors of Commonwealth, or personal representatives of such persons.

4. The Defendant, PAUL AMEN (Amen), is a citizen and resident of the City of Lincoln, Nebraska, and was Director of the Department of Banking and Finance of the State of Nebraska from January, 1979 to November 1, 1983.

5. The Defendant institutions named in this paragraph numbered 5 are Industrial Savings and Investment Companies, or corporate owners of Industrial Savings and Investment Companies, incorporated and doing business in the State of Nebraska from before 1976 through November 1, 1983, and the Defendant individuals were Directors of the Nebraska Depository Institution Guaranty Corporation (N.D.I.G.C.) residing in the Nebraska cities set forth opposite their names as follows:

ENTITIES

Commerce Savings Columbus, Inc. — Columbus
– Employer of Ken Wellman

First Savings Company — Grand Island
Employer of William Beckman

First National Bank — Grand Island
– Owner of First Savings Co. of Grand Island

NORWEST Corporation — Grand Island
– Owner of First National Bank Grand Island

Commerce Group, Inc. — Lincoln
– Owner of Commerce Savings Columbus, Inc.,
Commerce Savings Lincoln, Inc.,
and Commerce Savings Scottsbluff, Inc.

Commerce Savings Lincoln, Inc. — Lincoln
– Employer of Douglas Alford

Provident Federal Savings Bank — Lincoln
Successor of Liberty Savings Company,
Employer of Denis Applebee

Union Bank & Trust Company, — Lincoln
Successor of Northeast Savings Co.,
Employer of Herbert Heumann

American Security Bank — North Platte
Successor of American State Savings Co.,
Employer of Roy Ashcraft

Commerce Savings Scottsbluff, Inc. — Scottsbluff
Employer of Tim Spoeneman

INDIVIDUALS

Marvin Copple Director N.D.I.G.C., and officer of Commonwealth from before 1975 until after November 1, 1983	Lincoln
S.E. Copple Director, N.D.I.G.C., and officer of Commonwealth from before 1975 until after November 1, 1983	Lincoln
Ken Wellman	Columbus
William Beckman	Grand Island
Douglas Alford	Lincoln
Alfred Adams Employed by State Security Savings Co.	Lincoln
Kenlon H. Hake Employed by State Security Savings Co.	Lincoln
Roy Ashcraft	North Platte
Darrell Anderson Employed by American Savings Co.	Omaha
Tim Spoeneman	Scottsbluff
Denis Appelbee	Waverly
Herbert Heumann	Lincoln

At times material to this Amended Complaint, the Defendant entities named in this paragraph numbered 5 were employers or owners of employers of members of the Board of Directors of N.D.I.G.C., and are referred to hereafter, collectively with the named Individual Defendants as "N.D.I.G.C. board members" or "Directors".

FIRST CAUSE OF ACTION

6. The N.D.I.G.C. was chartered as a corporation by the State of Nebraska, in 1978, in accordance with the provisions of Section 21-17,127 to 21-17,145 R.R.S. Neb. 1943. These statutes set forth certain responsibilities for the N.D.I.G.C. and for the State of Nebraska (the State) through its Department of Banking and Finance (the Department). The N.D.I.G.C. and the State are associated in fact as an enterprise affecting interstate commerce (the Enterprise) within the meaning of 18 U.S.C. Section 1961(4).

7. Over a period of 58 months, beginning in January, 1979, the Defendants engaged in patterns of continuing racketeering activity within the meaning of 18 U.S.C. Sections 1961(5) and 1962(c). These continuing patterns of racketeering activity included the following separate but related criminal schemes or episodes:

EPISODE A: In 1979, Amen and the N.D.I.G.C. Directors (some of who are Defendants) adopted a plan to require N.D.I.G.C. members to advertise that each deposit account in member institutions was guarantied by N.D.I.G.C. up to $10,000.00. Amen and the Directors knew that N.D.I.G.C. did not have sufficient funds to make good this guaranty if members were declared insolvent by the Department. To disguise the insufficiency of the N.D.I.G.C. fund, the Directors deleted from the advertising they required any reference to the consequences of insolvency of a member institution. Amen and the Directors knew that the false guaranty information would be advertised by members through the United States mail and through interstate wire and electronic transmissions. On more than two occasions between January, 1979 and

April 28, 1980, member institutions advertised the false guaranty information through the U.S. mail and interstate wire and electronic transmissions, in violation of 18 U.S.C. Sections 1341 and 1343. The purpose of the false guaranty advertising was to induce investors and depositors to leave their money with member institutions and to place additional money with member institutions. This was done notwithstanding that some of those institutions were financially unsound, actually insolvent, or approaching insolvency. As a consequence the following separate harm has occurred:

1. N.D.I.G.C. undertook guaranties it could not cover and its members lost their contributions to N.D.I.G.C. fund in an amount more than $5,000,000.00;

2. N.D.I.G.C. became insolvent and is no longer operative as a corporation;

3. Depositors of member institutions were induced to continue their investments and deposits and ultimately lost more than $75,000,000.00 in the failure of three member institutions which were underinsured.

EPISODE B: By August 1, 1979, Amen knew that both American Savings Company and Commonwealth were financially unsound due to illegal activities of their officers and that either institution could be declared insolvent by the Department. Amen and the Directors believed that if the public learned that any industrial loan company was insolvent, members of N.D.I.G.C. would suffer a run of mass withdrawals of money. This action would in turn jeopardize the survival of all members including the institutions of which the Directors were

stockholders and employees. To prevent public awareness of the unsound financial condition of Commonwealth Savings Co., and with willful, wanton, and reckless disregard for the rights of Nebraska industrial loan investors and depositors, Amen failed and refused to declare either institution insolvent and failed and refused to take charge of the assets of either institution. Instead, Amen and the Directors admitted both Commonwealth and American Savings Company to membership in N.D.I.G.C. on August 7, 1979. As a consequence, the following have occurred:

1. Assets of both Commonwealth and American Savings Company continued to diminish for more than four years, until both were finally declared insolvent or bankrupt;

2. Thousands of investors and depositors of both institutions were misled to continue to repose confidence in the security of their investments and deposits and were prevented from taking action to protect their investment and deposits;

3. Investors and depositors were falsely informed that existing and future deposits in American Savings Company and Commonwealth were guarantied up to $10,000.00 each for the purpose of inducing further deposits and investments. This false information was disseminated through the U.S. mail and interstate wire and electronic transmissions, contrary to the provisions of 18 U.S.C. Sections 1341 and 1343. This was done every business day between August 7, 1979 and November 1, 1983. During this time, neither Amen nor the directors took

any action to declare either institution insolvent, or to take control of their assets and affairs, or to prevent their membership in N.D.I.G.C., or to remove them from membership. Investors and depositors in American Savings Company and in Commonwealth consequently lost the opportunity to protect millions of dollars in deposits and investments.

EPISODE C: By April, 1980, notwithstanding the acts and omissions of the Defendants described in paragraphs 7A and 7B above, the Defendants knew that the liquidity of Commonwealth and American Savings Company was continuing to deteriorate and their losses were mounting. The Federal Deposit Insurance Corporation (F.D.I.C.), which insured deposits in institutions competing with N.D.I.G.C. members, had increased its deposit guaranty to $100,000.00 per account. Amen and the Directors knew that felonious violations of state banking laws were continuing at Commonwealth and that losses at Commonwealth and American Savings Company were increasing rapidly. Notwithstanding this knowledge, on April 28, 1980, the Defendants increased the N.D.I.G.C. deposit guaranty from $10,000.00 to $30,000.00, in an attempt to make member institutions appear more competitive with institutions insured by the F.D.I.C. The Defendants knew that all N.D.I.G.C. members would disseminate advertising of the false $30,000.00 guaranty through documents deposited in the U.S. mail and by interstate wire and electronic transmissions, contrary to the provisions of 18 U.S.C. Sections 1341 and 1343. With the knowledge of the Defendants and on more than two occasions from April

28, 1980 until at least November 1, 1983, N.D.I.G.C. members deposited the false $30,000.00 guaranty in the U.S. mail and made interstate wire and electronic transmissions of the false $30,000.00 guaranty, contrary to the provisions of 18 U.S.C. Sections 1341 and 1343. As a consequence of this episode, the following harm occurred:

1. Investors and depositors of N.D.I.G.C. member institutions were misled to believe that their investments and deposits were secure. Because of this false information, investors and depositors lost the opportunity to take action to prevent or reduce their risks by withdrawing their funds, by compelling action to reduce further diminution of institutional assets, or by avoiding further deposits and investments.

2. N.D.I.G.C. members, Commonwealth, American Savings Company, and State Securities Savings Co. were declared insolvent or bankrupt in 1983 and 1984. Their depositors and investors lost millions of dollars more than they would have lost if they had taken protective action as described above.

EPISODE D: By December, 1981, the Defendants, Darrell Anderson, Douglas Alford, Kenlon Hake, and S.E. Copple discovered that officers of Industrial Savings Company (Industrial) had caused substantial losses to Industrial through felonious conversions. Industrial was a Nebraska industrial loan company which was not an N.D.I.G.C. member. Stockholders of Industrial included S.E. Copple and N.D.I.G.C. members First Savings Company (Grand Island), State Security Savings Co., First Security Savings

Co., Commonwealth Savings Co., American Savings Company of Omaha, and Commerce Savings Lincoln, Inc. All of these N.D.I.G.C. members, except First Security Savings Co., were represented on the N.D.I.G.C. Board of Directors by the following persons:

William Beckman – First Savings Co.
Kenlon Hake – State Security Savings Co.
Alfred Adams – State Security Savings Co.
S.E. Copple – Commonwealth Savings Co.
Marvin Copple – Commonwealth Savings Co.
Darrell Anderson – American Savings Co.
Douglas Alford – Commerce Savings Lincoln

First Security Savings Co. was not represented on the N.D.I.G.C. Board of Directors, but had been purchased from S.E. Copple by James Gillette who was married to S.E. Copple's granddaughter.

Hake, Alford, Anderson, and S.E. Copple undertook to reorganize and stabilize Industrial in 1981 and early 1982. By May, 1982, it was apparent that Industrial would have to be declared insolvent by the Department unless new capital was injected into it. Hake, Alford, Beckman, Adams, and S.E. Copple decided that their institutions either would have to inject more capital into Industrial or would have to arrange an outside capital injection to avoid potentially disastrous losses to themselves and their employer institutions. This was because these men believed that a declared insolvency of Industrial would have a domino effect by starting a run on all other industrial loan companies in the state. Anderson, Hake, and S.E. Copple developed a plan as follows:

1. Robert Short (who had purchased N.D.I.G.C. – member American Savings

from Anderson) would inject more capital into American Savings;

2. American Savings would acquire Industrial by merger and absorb its losses;

3. Amen and the Department would permit American to capitalize on its books Industrial's $1,200,000.00 loss as "good will" to give American Savings the appearance of an acceptable capital-to-liability ratio;

4. Omaha National Bank would loan American Savings $450,000.00 to use on its books as capital;

5. N.D.I.G.C. would advance from its deposit guaranty fund $500,000.00 to American Savings in exchange for a capital note. In addition, N.D.I.G.C. would loan American Savings up to $700,000.00 from N.D.I.G.C.'s deposit guaranty fund to cover American Savings' and Industrial's losses. This loan would be secured by questionable and classified assets of Industrial of which not more than $350,000.00 was believed by Defendants to be collectable.

On July 7 and July 16, 1982, the Directors agreed to the proposed plan. They rationalied that this was best to avoid the need for capital injection by member institutions which were also Industrial stockholders. N.D.I.G.C. then transferred to American Savings the amounts set forth above, reducing available funds in the deposit guaranty account by $1,200,000.00 This agreement and the proposed plan were approved by Amen, notwithstanding that the agreement and plan violated Section 21-17,135(3), R.R.S. Neb. 1943, and were willful, wanton, or fraudulent.

As a consequence of this episode, at least the following harm occurred:

1. American Savings Company's financial position was substantially impaired to the detriment of its investors and depositors;

2. American Savings Company's true financial position was substantially misrepresented on its books;

3. Depositors of American Savings and depositors of Industrial Savings (whose deposits were transferred to American Savings) were falsely led to believe that their funds were secure and lost their opportunity to take action to protect their funds;

4. A subsequent purchaser of American Savings Company, MorAmerica Financial Corp., was misled to believe that American Savings Company was financially sound and lost $5,500;000.00 upon the subsequent bankruptcy of American Savings Company (see paragraph 7G, below);

5. Depositors of N.D.I.G.C. member institutions subsequently declared insolvent or bankrupt (American Savings Co., State Security Savings Co., and Commonwealth) suffered the further diminution of the N.D.I.G.C. guaranty fund and the consequent loss of the protection of that fund in the sum of $1,200,000.00;

6. The Defendants knew that when the above plan was implemented American Savings would deposit in the U.S. mail notices to Industrial depositors falsely representing that their deposits were secure. American

Savings, on more that [sic] two occasions, did deposit such notices in the U.S. mail contrary to the provisions of 18 U.S.C. Section 1341.

EPISODE E: On December 22 and December 23, 1982, the Defendants developed and implemented a plan to transfer to the Dwight Cooperative Credit Association (Dwight Coop), about $600,000.00 from the N.D.I.G.C. deposit guaranty fund, The purpose of this plan was to offset losses suffered by Dwight Coop from felonious conversions by its officers which had rendered Dwight Coop insolvent. The transfer of these N.D.I.G.C. deposit guaranty funds was contrary to the provisions of Section 21-17,135(3) R.R.S. Nebr. 1943, and was willful, wanton, or fraudulent as follows:

1. The transfer was made for the purpose of preventing public discovery of the inadequacy of the N.D.I.G.C. deposit guaranty fund and misled investors and depositors of Nebraska industrial loan companies and cooperative credit associations to believe their investments and deposits were secure;

2. The transfeer [sic] substantially diminished the amount avaiable [sic] for depositors of insolvent N.D.I.G.C. members at a time when the Defendants knew (a) there would arise from insolvencies covered claims entitled to payment under Section 21-17,131 R.R.S. Neb. 1943, from the deposit guaranty fund and (b) covered claims would exceed the amount of the fund.

3. The transfer contributed to the reality that advertisements of N.D.I.G.C. member institutions that stated deposits were guarantied

by N.D.I.G.C. up to $30,000.00 each, were false and fraudulent. This was done by diminishing the N.D.I.G.C. deposit guaranty fund to an insufficient level;

4 Notwithstanding the transfer, the Defendants continued from December 22, 1982 through November 1, 1983, to require advertisement by N.D.I.G.C. member institutions. These institutions on more than two occasions, deposited in the U.S. mail and advertised in interstate wire and electronic transmissions, the false N.D.I.G.C. deposit guaranty. This was done contrary to the provisions of 18 U.S.C. Section 1341 and 1343.

EPISODE F: During 1981 and 1982, James Gillette (son-in-law of Marvin Copple) and Newton Copple (son of S.E. Copple) conspired unlawfully to transfer for Newton Copple's use more than $1,000,000.00 from funds of First Security Savings Co. As a consequence of these transfers, First Security Savings was insolvent by November 14, 1982. Amen became aware that the Gillette-Newton Copple conspiracy was under investigation by the Federal Bureau of Investigation (FBI). Amen believed that the FBI investigation would result in eventual public disclosure of the insolvency of First Security Savings. He also believed this would in turn have a domino effect on other Nebraska industrial loan companies by starting a run of their depositors to withdraw deposits. Amen believed the FBI investigations and a run on industrial loan companies would result in public discovery (a) that the N.D.I.G.C. deposit guaranty fund was inadequate to pay covered claims; (b) that Amen had willfully failed to declare insolvencies of First Security Savings, American Savings, and

Commonwealth; and (c) that Amen had willfully failed and refused to perform his official duties and was guilty of misconduct in office. Amen decided to arrange a purchase of First Security Savings in the hope that the FBI investigation would be terminated. Amen decided not to seek prosecution of Newt Copple or Gillette and to permit S.E. Copple to repay Newton Copple's debt to First Security Savings. S.E. Copple knew that the FBI investigations or any other public exposure of the crimes of James Gillette and Newton Copple would lead to discovery of the unstable financial condition of Commonwealth and his own crimes. S.E. Copple accordingly agreed with Amen to sign a promissory note for $1,280,000.00 to First Security Savings to secure Newton Copple's indebtedness. In addition, between January 1, 1983, and April 10, 1983, S.E. Copple and Amen developed a scheme to obtain the transfer of $800,000.00 from N.D.I.G.C. deposit guaranty funds to First National Bank of Omaha (First National). The purpose of this scheme was to induce First National to purchase First Security Savings Company so that (a) it would not be declared insolvent by the Department; (b) the need for continuing FBI investigation would diminish; and (c) Amen and S.E. Copple could continue to cover up their criminal activities. At the direction of Amen, the N.D.I.G.C. Board members transferred $800,000.00 to First National from N.D.I.G.C. deposit guaranty funds. This money was used in part to offset the losses of First Security Savings which occurred when S.E. Copple later defaulted on his promissory note and Newton Copple failed to repay his indebtedness. The Defendants knew that transfer of these funds from N.D.I.G.C. was in violation of Section 21-17,135(3) R.R.S. Neb. 1943,

and would substantially impair the ability of N.D.I.G.C. to make good on its guaranty but continued to require N.D.I.G.C. member institutions to advertise that deposits were guarantied up to $30,000.00. These advertisements, on more than two occasions, were deposited in the U.S. mail and disseminated through interstate wire and electronic transmissions contrary to the provisions of 18 U.S.C. Section 1341 and 1343. This scheme constituted obstruction of government operations under Section 28-901 R.R.S. Neb. 1943, and obstruction of the FBI investigation contrary to the provisions of 18 U.S.C. Section 1510.

EPISODE G: Beginning in February 1983, Amen and employees of the Department under his direction began soliciting the purchase of American Savings Co. by MorAmerica Financial Corp. of Cedar Rapids, Iowa. On October 3, 1983, MorAmerica agreed to purchase American Savings, relying upon false representations by Amen as follows:

1. That the industrial loan industry in Nebraska was sound;
2. That N.D.I.G.C. guaranties of deposits up to $30,000.00 each insured the security of American Savings depositors;
3. That Department examinations of American Savings were accurate and correctly reflected American Savings' financial condition.

These representations were false for the reasons described in paragraphs 7A through 7F above. The Defendant N.D.I.G.C. Directors participated in this episode by failing to disclose the true financial condition of

American Savings, which they knew, and by failing and refusing to fulfill their positive statutory duty and fiduciary duty to seek control of the assets and affairs of American Savings. The closing of Commonwealth on November 1, 1983 triggered discovery of the unsound financial condition of American Savings. As a result, American Savings was forced into bankruptcy. The harm caused by this episode was MorAmerica's loss of its investment and its own bankruptcy, in the amount of $5,500,000.00. In the course of planning and implementing this scheme, Amen deposited, on more than two occasions, false representations in the U.S. mail contrary to the provisions of 18 U.S.C. Section 1341. These false representations were from Amen and Department counsel, Barry Lake, to officers of MorAmerica describing the advantages of purchase of American Savings and representing American Savings as financially sound.

Plaintiffs are unable to plead with more particularity the dates and contents of letters mailed and wire transmissions until discovery is accomplished. Records of correspondence are in the possession of Defendants and many of the records are regarded confidential under state law.

8. The Defendants conducted the affairs of the Enterprise through a pattern of racketeering activity with reference to Commonwealth as follows:

   A. Commonwealth is an Industrial Loan and Investment Company incorporated before 1950 under the laws of the State. Commonwealth is a member of the N.D.I.G.C. and is subject to the regulation and control of the Department, pursuant to Section 8-401.01 R.R.S. Neb. 1943, and

of N.D.I.G.C. pursuant to sections 21-17,127 to 21-17,145 R.R.S. Neb. 1943.

B. Defendant Amen, as Director of the Department and the other Defendants as Directors of or employers of Directors of the N.D.I.G.C., conducted the affairs of the Enterprise between August 7, 1979 and November 1, 1983.

C. Between August 7, 1979, and April 28, 1980, the Defendants caused the Enterprise to require that N.D.I.G.C. member institutions engage in false and fraudulent advertising, in that:

1. The Defendants knew Commonwealth was a member of N.D.I.G.C. and that it was required by Nebraska law to comply with account guaranty advertising laws and rules of the Enterprise;

2. The Defendants knew Commonwealth deposits exceeded $58,000,000.00;

3. The Defendants knew that Commonwealth was insolvent and that S.E. Copple and Marvin Copple were engaged in felonious conversions of Commonwealth deposits and investments;

4. The Defendants knew that N.D.I.G.C. did not have sufficient assets to replace the deposits and investments in Commonwealth up to $10,000.00 per account, in the event of the failure of Commonwealth;

5. The Defendants established and maintained rules of the Enterprise requiring N.D.I.G.C. member institutions including Commonwealth to advertise and that deposits in institutions were guarantied to the amount of $10,000.00 per account,

with intent that depositors and investors in such member institutions would rely upon the guaranty as an inducement to make deposits and leave deposits with member institutions;

6. At the direction of the Defendants through the Enterprise, Commonwealth published advertisements of the guaranties as set forth in this subparagraph 8C.

D. Between April 28, 1980 and November 1, 1983, the Defendants caused the Enterprise to require that N.D.I.G.C. member institutions engage in false and fraudulent advertising in the following ways:

1. The Defendants knew Commonwealth was a member of N.D.I.G.C. and that it was required by Nebraska law to comply with account guaranties advertising rules of the enterprise;

2. The Defendants knew Commonwealth deposits exceeded $58,000,000.00;

3. The Defendants knew that Commonwealth was insolvent and that S.E. Copple and Marvin Copple were engaged in felonious conversions of Commonwealth deposits and investments;

4. The Defendants knew that N.D.I.G.C. did not have sufficient assets to replace the deposits and investments in Commonwealth up to $30,000.00 per account in the event of the failure of Commonwealth;

5. The Defendants established and maintained rules of the Enterprise requiring N.D.I.G.C. member institutions including

Commonwealth, to advertise that deposits in said institutions were guarantied to the amount of $30,000.00 per account, with intent that depositors and investors in the member institutions would rely upon the guaranty as an inducement to make deposits and leave deposits with member institutions;

6. At the direction of the Defendants through the Enterprise, Commonwealth published advertisements of the guaranties as set forth in this subparagraph 9D.

E. Between August 7, 1979, and November 1, 1983, the Defendants, by enacting and implementing through the Enterprise the guaranty rules described in subparagraphs 8C and 8D above, caused the advertising of false and fraudulent guaranties to be deposited by Commonwealth in authorized depositories for mail matter, to be sent and delivered by the U.S. mail and to be transmitted in interstate commerce by wire on more than two occasions.

F. The Plaintiffs, reasonably relying upon the inducement created by the guaranties described above in subparagraphs 8C, 8D, and 8E, made or left with Commonwealth money in the form of investments and deposits in passbook savings accounts, trust accounts, money market accounts, individual retirement accounts, pension and welfare funds, certificates of indebtedness, capital notes, promissory notes, or checks, or extended credit to Commonwealth for goods or services supplied to Commonwealth.

G. Commonwealth accepted and retained the money tendered to and left in Commonwealth

by the Plaintiffs as described above in subparagraph 8F in the amount of $58,000,000.00.

H. Between January 1, 1975, and November 1, 1983, S.E. Copple and Marvin Copple knowingly, willfully, and with intent to steal, and as part of their conduct of the affairs of the enterprise, unlawfully converted to their own use and benefit and removed from the State of Nebraska some of the money tendered to and left with Commonwealth by the Plaintiffs. These acts of S.E. Copple and Marvin Copple proximately caused the insolvency of Commonwealth.

I. From September, 1978, to November 1, 1983, Amen knew of the insolvency of Commonwealth caused by the various felonious acts of S.E. Copple and Marvin Copple. Willfully and with reckless disregard for the business and property of the Plaintiffs, Amen as a part of his conduct of the affairs of the Enterprise, failed and refused to declare Commonwealth insolvent or to take control of Commonwealth until November 1, 1983, notwithstanding that he had a positive duty to do so under Section 8-416 R.R.S. Neb. 1943. The N.D.I.G.C. members, on and after August 7, 1979, willfully and with reckless disregard for the business and property of the Plaintiffs and as a part of their conduct of the affairs of the Enterprise (1) failed to direct Amen to provide to them a copy of the most recent State Banking Department report of its examination of Commonwealth, notwithstanding that they had authority to do so under the provisions of Section 21-17,137(2) R.R.S. Neb. 1943; (2) failed to consider the economic advisability of guaranteeing Commonwealth accounts, contrary to the provisions of Section

21-17,134(1) R.R.S. Neb. 1943; and (3) failed and refused to take action to declare the insolvency of Commonwealth.

J. On November 1, 1983, Commonwealth was declared insolvent by Amen, in accordance with the provisions of Section 8-416 R.R.S. Neb. 1943. On November 1, 1983, the Department of Banking of the State was appointed Receiver of Commonwealth, in accordance with Sections 8-416 and 8-198 R.R.S. Neb. 1943, by the District Court of Lancaster County, Nebraska.

K. From September, 1978, to November 1, 1983, Amen, S.E. Copple, Marvin Copple, and N.D.I.G.C. board members, willfully, fraudulently, and with reckless disregard for the business and property of the Plaintiffs, and as part of their conduct of the affairs of the Enterprise did the following:

1. They failed and refused to make adequate provisions for payment to the Plaintiffs of the amounts guaranteed by N.D.I.G.C.;

2. They failed and refused to take action to discover and disclose the insolvency of Commonwealth and provide the funds necessary to make good their guaranty to Plaintiffs, notwithstanding positive duties to do so enjoined upon them by the provisions of Section 21-17,127 through 21-17,145 R.R.S. Neb. 1943; and

3. They obstructed investigations by law enforcement agencies of the City of Lincoln, Nebraska and of the United States, on more than two occasions.

L. From August 7, 1979, to November 1, 1983, the Defendants, S.E. Copple and Marvin Copple,

aided and abetted by Amen, as part of their conduct of the affairs of the Enterprise, fraudulently offered for sale to plaintiffs Commonwealth securities, on more than two occasions.

M. On or about April 14, 1981, S.E. Copple, with the knowledge and approval of Amen, and as part of their conduct of the affairs of the Enterprise, caused Commonwealth to enter into a false and fraudulent extension of credit to Dana Saylor-Robinson in the amount of $1,124,433.83, with the understanding of S.E. Copple and Dana Saylor-Robinson that failure to repay or delay in payment of the extension of credit could result in the use of criminal means to cause harm to the property of the Plaintiffs.

N. On or about April 8, 1983, as part of his conduct of the affairs of the Enterprise, S.E. Copple willfully and with reckless disregard for the business and property of the Plaintiffs and at the direction of Amen, pledged assets of Commonwealth (promissory notes of Dana Saylor-Robinson executed in the transaction described in subparagraph 8M, above) to secure debts of S.E. Copple's son, Newt Copple.

O. On or about April 8, 1983, at the direction of Amen, the N.D.I.G.C. members, as part of their conduct of the affairs of the Enterprise, willfully and with reckless disregard for the business and property of the Plaintiffs, transferred cash reserves of N.D.I.G.C. in the amount of $400,000.00 and pledged N.D.I.G.C. cash reserves in the amount of an additional $400,000.00, to secure debts of S.E. Copple's son, Newt Copple, thereby depleting N.D.I.G.C. funds available for the guaranty of Commonwealth accounts.

9. As a direct and proximate result of the foregoing acts and omissions of the Defendants, the Plaintiffs lost their money tendered and paid to Commonwealth or deposited with and retained by Commonwealth or their credit extended to Commonwealth, in the Amount of $58,000,000.00.

10. The participation by each Defendant in the conduct of the affairs of the Enterprise, as set forth above in paragraphs numbered 6, 7, and 8, was through a pattern of racketeering activity as follows:

    A. Having devised a scheme or artifice for obtaining money and property by means of false and fraudulent pretense, representations, and promises, and for the purpose of executing said scheme or artifice, the Defendants caused to be placed in post offices or authorized depositories for mail matter, on more than two occasions, documents containing such false and fraudulent pretense, representations and promises to be sent and delivered by U.S. mail contrary to the provisions of 18 U.S.C. Section 1341.

    B. S.E. Copple and Marvin Copple embezzled money from pension and welfare funds, contrary to the provisions of 18 U.S.C. Section 664.

    C. S.E. Copple engaged in an extortionate credit transaction contrary to the provisions of 18 U.S.C. Section 891 through 894.

    D. The Defendants, having devised a scheme or artifice for obtaining money and property by means of false and fraudulent pretense, representations, and promises, and for the purpose of executing the scheme or artifice, transmitted or caused to be transmitted in interstate commerce, on more than two occasions, communications by

wire, contrary to the provisions of 18 U.S.C. Section 1343.

E. The Defendants, in conducting the affairs of the Enterprise, engaged in obstruction of justice, obstruction of criminal investigations, and obstruction of investigations by State, United States, and local law enforcement agencies, on more than two occasions, contrary to the provisions of 18 U.S.C. Section 1503, 1510, and 1511.

F. The Defendants engaged in or facilitated the interstate transportation of stolen property, contrary to the provisions of 18 U.S.C. Sections 2314 and 2315.

G. The Defendants engaged in or facilitated fraud in the sale of securities on more than two occasions, contrary to the provisions of 18 U.S.C. Section 1961(1)(d).

11. The acts of the Defendants set forth in paragraphs numbered 6, 7, and 8, above, and the offenses set forth in paragraph numbered 10, above, occurred within ten years of each other and after October 15, 1970. They were connected by a common scheme, plan, and motive of the Defendants in the conduct of the affairs of the Enterprise.

12. The Defendants, by reason of the conduct described in paragraphs numbered 6, 7, 8, and 10, above, received income derived directly and indirectly from the patterns of racketeering activity therein described, and acquired and maintained an interest in and control of an Enterprise affecting interstate commerce, and conspired to receive income derived directly or indirectly from patterns of racketeering activity, and conspired to acquire and maintain an interest in and control of an enterprise affecting interstate commerce.

The Plaintiffs request that the Court enter judgment against the Defendants, jointly and severally, and in favor of the Plaintiffs, in the amount of three-fold the damages sustained by the Plaintiffs, as set forth above, together with costs of this action, reasonable attorneys' fees, and interest from the date damage occurred.

SECOND CAUSE OF ACTION

13. The Plaintiffs reallege and incorporate in this second Cause of Action the allegations set forth in paragraphs 1 through 12.

WHEREFORE, the Plaintiffs pray that the Court enter an order as follows:

1. Preventing and restraining the Defendants from committing further violations of 18 U.S.C. Sections 1962 through 1968.

2. Divesting the Defendants of their interest in and control of the enterprise and any assets of the Enterprise including claims of the Enterprise to any assets of Commonwealth and of N.D.I.G.C.

3. Imposing reasonable restrictions on further activities of the Defendants with respect to assets of Commonwealth and N.D.I.G.C.

4. Ordering reorganization of the Enterprise in such a way as to make due provision for the rights of the Plaintiffs.

5. Granting the Plaintiffs such other, further, and different relief as may be provided by law or in equity.

Respectfully submitted,

CLAUDE T. WEIMER and
ASSOCIATION OF COMMONWEALTH CLAIMANTS,

Plaintiffs.

BY: /s/ Robert R. Gibson
ROBERT R. GIBSON,
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and

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Two of Plaintiffs' Attorneys

CERTIFICATE OF SERVICE

Copies of this Amendment To The Complaint were mailed on January 26, 1987, to the following addresses:

/s/ Robert R. Gibson
Robert R. Gibson

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William Kuester
400 Lincoln Ben. Li
Lincoln, NE 68508

EXHIBIT A

ENTITIES

Commerce Savings Columbus, Inc. –Employer of Ken Wellman	Columbus
First Savings Company –Employer of William Beckman	Grand Island
First National Bank –Owner of First Savings Co. of Grand Island	Grand Island
NORWEST Corporation –Owner of First National Bank Grand Island	Grand Island
Commerce Group, Inc. –Owner of Commerce Savings Columbus, Inc.,	Lincoln

Commerce Savings Lincoln, Inc.,
and Commerce Savings Scottsbluff, Inc.

Commerce Savings Lincoln, Inc. –Employer of Douglas Alford	Lincoln
Provident Federal Savings Bank Successor of Liberty Savings Company, Employer of Denis Applebee	Lincoln
Union Bank & Trust Company, Successor of Northeast Savings Co., Employer of Herbert Heumann	Lincoln
American Security Bank Successor of American State Savings Co. Employer of Roy Ashcraft	North Platte
Commerce Savings Scottsbluff, Inc. Employer of Tim Spoeneman	Scottsbluff

INDIVIDUALS

Marvin Copple Director, N.D.I.G.C., and officer of Commonwealth from before 1975 until after November 1, 1983	Lincoln
S.E. Copple Director, N.D.I.G.C., and officer of Commonwealth from before 1975 until after November 1, 1983	Lincoln
Ken Wellman	Columbus
William Beckman	Grand Island
Douglas Alford	Lincoln
Alfred Adams Employed by State Security Savings Co.	Lincoln

Kenlon H. Hake Employed by State Security Savings Co.	Lincoln
Roy Ashcraft	North Platte
Darrell Anderson Employed by American Savings Co.	Omaha
Tim Spoeneman	Scottsbluff
Denis Appelbee	Waverly
Herbert Heumann	Lincoln

(2)

No. 91-1920

Supreme Court, U.S.
FILED
JUN 22 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

CLAUDE T. WEIMER, For Himself; and
ASSOCIATION OF COMMONWEALTH CLAIMANTS,
An Unincorporated Association,

Petitioners,

vs.

PAUL AMEN; COMMERCE SAVINGS COLUMBUS, INC.; FIRST SAVINGS CO.; FIRST NATIONAL BANK; NORWEST CORP.; COMMERCE GROUP, INC.; COMMERCE SAVINGS LINCOLN, INC.; PROVIDENT FEDERAL SAVINGS BANK; AMERICAN SAVINGS COMPANY; COMMERCE SAVINGS SCOTTSBLUFF, INC.; KEN WELLMAN; WILLIAM BECKMAN; DOUGLAS ALFORD; ALFRED ADAMS; KENLON H. HAKE; ROY ASHCRAFT; DARRELL ANDERSON; TIM SPOENENMAN; DENIS APPELBEE,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

JOINT BRIEF FOR RESPONDENTS

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Counsel of Record
for the Respondents

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OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Whether alleged RICO violations in administering a state-chartered deposit insurance corporation proximately caused losses to creditors of an insured bank which occurred when the bank failed.

2. Whether it was an abuse of discretion to dismiss an amended complaint for failure to state a claim without granting a post-dismissal request for leave to amend.

PARTIES TO THIS PROCEEDING

The petition does not include the list of the parties required by Supreme Court Rule 14.1(b).

Petitioner:

Association of Commonwealth Claimants (ACC).

Respondents:

Paul Amen.

First National Bank Grand Island[1]

First Savings Co. of Grand Island[2]

Norwest Corp.[3]

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[1] Parent: Norwest Corp.
Subsidiary: First Savings Co. of Grand Island.

[2] Parent: First National Bank Grand Island; no subsidiary.

[3] No parent; subsidiaries: Chalfen Bankshares, Inc.; Norwest Holding Company (subsidiary Norwest Bank Minnesota, N.A. (subsidiaries: Centennial Investment Corporation; Norwest Business Credit, Inc.; Norwest Equipment Finance, Inc. (subsidiaries: Commonwealth Leasing Corporation; Radio Dealers Leasing, Inc.); Norwest Bank International, Colorado; Norwest Bank International, Iowa; Norwest Bank International, Wisconsin; Norwest Funding, Inc.; Norwest Trust Company, New York; Minneapolis Asset Management, Inc.; Norwest Bank International (subsidiary: Norwest Asia Limited); Flora Properties, Inc.)); The Bank Information Services, Inc.; Norwest Bank Minnesota Central, N.A.; Norwest Bank

(Continued on following page)

PARTIES TO THIS PROCEEDING – Continued

(Continued from previous page)

Minnesota Mesabi, N.A.; Norwest Bank Minnesota North, N.A.; Norwest Bank Minnesota South, N.A.; Norwest Bank Minnesota South Central, N.A.; Norwest Bank Minnesota Southeast, N.A.; Norwest Bank Minnesota Southwest, N.A.; Norwest Bank Minnesota West, N.A.; Norwest Bank Red Wing, N.A.; Norwest Bank Waseca, N.A.; Norwest Bank Arizona, N.A.; Norwest Colorado, Inc. (subsidiaries: Norwest Bank Academy Place, N.A.; Norwest Bank Arapahoe, N.A.; Norwest Bank Arvada, N.A.; Norwest Bank Aurora, N.A.; Norwest Bank Aurora-City Center, N.A.; Norwest Bank Aurora-South, N.A.; Norwest Bank Bear Valley, N.A.; Norwest Bank Boulder, N.A. (subsidiary: Pearl Properties, Inc.); Norwest Bank Brighton, N.A.; Norwest Bank Broomfield, N.A.; Norwest Bank Buckingham Square, N.A.; Norwest Bank Cherry Creek, N.A.; Norwest Bank Colorado Springs, N.A.; Norwest Bank Colorado Springs-East, N.A.; Norwest Bank Delta, N.A.; Norwest Bank Denver, N.A. (subsidiaries: United Asset Management Services, Inc.; Norwest Operations Services, Inc.; Freemont Properties, Inc.; Stoutco, Inc.; Lincoln Building Corporation; The Bankers Company; United Mortgage Company; UBD Capital, Inc.; United Delivery Systems, Inc.; Mountain States Bankcard Association; TW Properties, Inc.; Capital Community Development Corp.); Norwest Bank Durango, N.A.; Norwest Bank Fort Collins, N.A.; Norwest Bank Fort Collins-South, N.A.; Norwest Bank Garden of the Gods, N.A.; Norwest Bank Grand Junction, N.A.; Norwest Bank Grand Junction-Downtown, N.A.; Norwest Bank Greeley, N.A.; Norwest Bank Highlands Ranch, N.A.; Norwest Bank Lakewood, N.A.; Norwest Bank LaSalle, N.A.; Norwest Bank Littleton, N.A.; Norwest Bank Longmont, N.A.; Norwest Bank Monaco, N.A.; Norwest Bank Montrose, N.A.; Norwest Bank Northglenn, N.A.; Norwest Bank Pueblo, N.A.; Norwest Bank Southglenn, N.A.; Norwest Bank Southwest Plaza, N.A.; Norwest Bank Steamboat Springs, N.A.; Norwest Bank Sterling, N.A.; Norwest Bank Sunset Park, N.A.; United Bank of Ignacio National

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PARTIES TO THIS PROCEEDING – Continued

(Continued from previous page)

Association); First Illini Bancorp, Inc. (subsidiary: First Illini Bank); Norwest Bank Indiana, N.A. (subsidiaries: South Bend Asset Management, Inc.; National Autopark, Inc.; Nat-Lea, Inc.; Nabankco, Inc. (subsidiary: La Salle, Inc.)); Davenport Bank and Trust Company, N.A. (subsidiaries: Bettendorf Asset Management, Inc.; Davenport Blackhawk Civic Corp.; D.B. Food Service, Inc.; Davenport Bancorporation; NOW, Inc.; Tower Data Processing Corporation); Blackhawk Bancorporation (subsidiary: Blackhawk Leasing Corporation); P B Bancorp of Cedar Rapids, Inc. (subsidiary: Norwest Bank Iowa, N.A. (subsidiaries: Iowa Asset Management, Inc.; Des Moines Holding Company)); Norwest Bank Anaconda-Butte, N.A.; Norwest Bank Billings, N.A. (subsidiary: Buffarn, Inc.); Norwest Bank Dillon, N.A.; Norwest Bank Great Falls, N.A.; Norwest Bank Helena, N.A.; Norwest Bank Kalispell, N.A.; Norwest Bank Lewistown, N.A.; Norwest Bank Nebraska, N.A. (subsidiary: Sgnik, Incorporated); Norwest Bank Nebraska Lincoln, N.A.; Norwest Bank North Dakota, N.A.; Norwest Bank South Dakota, N.A. (subsidiary: South Dakota Asset Management, Inc.); Norwest Bank Wisconsin, N.A. (subsidiaries: Green Bay Asset Management, Inc.; First Interstate Insurance Agency of Wisconsin, Inc.); Norwest Bank Wisconsin Eau Claire, N.A. (subsidiary: Eau Claire Asset Management, Inc.); Norwest Bank Wisconsin Waupun (subsidiaries: Risk Consultants, Inc.; Waupun Asset Management, Inc.); Norwest Bank La Crosse, N.A. (subsidiary: La Crosse Asset Management, Inc.); Wyoming National Bancorporation (subsidiaries: Norwest Bank Wyoming Casper, N.A.; Norwest Bank Wyoming Cheyenne, N.A.; Norwest Bank Wyoming Gillette, N.A.; Norwest Bank Wyoming Lovell, N.A.; Norwest Bank Wyoming Wheatland, N.A. (subsidiary: Norwest Insurance Wyoming, Inc.); Wyoming National Corporation); Norwest Capital Management & Trust Co., Montana; American Land Title Co., Inc.; CI Real Estate Holding Corporation; Fidelity National Life Insurance

(Continued on following page)

PARTIES TO THIS PROCEEDING – Continued

(Continued from previous page)

Company; First Interstate Equipment Finance of Wisconsin, Inc.; IntraWest Insurance Company; Lincoln Agency, Inc./ Phoenix, Arizona; MIG Insurance Brokers, Inc.; Minnesota FSL Corporation; Minnetonka Overseas Investment Limited (subsidiary: Minnetonka Represent Commercials Ltd.); Northern Prairie Indemnity Limited (subsidiary: Superior Guaranty Insurance Company); Nortico Investments Limited; Norwest Agricultural Credit, Inc.; Norwest Alliance System, Inc.; Norwest Audit Services, Inc.; Norwest Capital Markets, Inc.; Norwest Credit, Inc.; Norwest Financial Services, Inc. (subsidiaries: Dial National Bank; Norwest Financial Credit Services, Inc.; Norwest Financial, Inc. (subsidiaries: Agency Technologies Data Services, Inc. of Florence; Centurion Agency Ohio, Inc.; Centurion Agencies Co.; Centurion Finance Company; Centurion Life Insurance Company); Dial Bank (subsidiaries: CHM Insurance Company; Centurion Casualty Company); Dial Finance Company, Inc.; Dial Finance Company, Incorporated; Dial Finance Company of Hawaii, Inc.; Dial Finance Company of Michigan No. 1; Dial Finance Company of Ohio No. 1, Inc.; Merger Company, Inc.; Dial Finance Company of Oklahoma; Dial Finance Company of Oregon; Dial Finance Company of Washington; Ellis Advertising, Inc.; Faxual Credit Reporting Service Inc.; IFCO Corporation; IFCO North Carolina, Inc.; IFCO Virginia, Inc.; Mail Systems Co.; Mercury Marine Finance, Inc.; Norwest Credit Services New York, Inc.; Norwest Financial Acceptance, Inc. (formerly XL Credit Plan, Inc.); Norwest Financial Alabama, Inc.; Norwest Financial Alaska, Inc.; Norwest Financial America, Inc.; Norwest Financial Arizona, Inc.; Norwest Financial Burnsville, Inc.; Norwest Financial Business Credit, Inc.; Norwest Financial California, Inc.; Norwest Financial Coast, Inc.; Norwest Financial Colorado, Inc.; Norwest Financial Connecticut, Inc.; Norwest Financial Consumer Discount Company; Norwest Financial Delaware, Inc.; Norwest Financial Escrow System

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PARTIES TO THIS PROCEEDING – Continued

(Continued from previous page)

California, Inc.; Norwest Financial Florida, Inc. (subsidiary: Norwest Financial System Florida, Inc.); Norwest Financial Fridley, Inc.; Norwest Financial Georgia, Inc.; Norwest Financial Golden Valley, Inc.; Norwest Financial Hawaii, Inc.; Norwest Financial Idaho, Inc.; Norwest Financial Illinois, Inc.; Norwest Financial Indiana, Inc.; Norwest Financial Industrial Loan Company; Norwest Financial Industrial West Virginia, Inc.; Norwest Financial Information Services Group, Inc.; Norwest Financial Inver Grove Heights, Inc.; Norwest Financial Iowa 1, Inc.; Norwest Financial Iowa 2, Inc.; Norwest Financial Iowa 3, Inc.; Norwest Financial Kansas, Inc.; Norwest Financial Kentucky, Inc.; Norwest Financial Kentucky 1, Inc.; Norwest Financial Leasing, Inc.; Norwest Financial Louisiana, Inc.; Norwest Financial Maine, Inc.; Norwest Financial Maplewood, Inc.; Norwest Financial Maryland, Inc.; Norwest Financial Maryland 1, Inc.; Norwest Financial Massachusetts; Norwest Financial Massachusetts 1; Norwest Financial Massachusetts 1, Inc.; Norwest Financial Massachusetts, Inc.; Norwest Financial Minnesota, Inc.; Norwest Financial Mississippi, Inc.; Norwest Financial Missouri, Inc.; Norwest Financial Missouri 1, Inc.; Norwest Financial Montana, Inc.; Norwest Financial Nebraska, Inc.; Norwest Financial Nevada, Inc.; Norwest Financial Nevada 1, Inc.; Norwest Financial Nevada 2, Inc.; Norwest Financial New Hampshire, Inc.; Norwest Financial New Hampshire 1, Inc.; Norwest Financial New Jersey, Inc.; Norwest Financial New Mexico, Inc.; Norwest Financial New Mexico 1, Inc.; Norwest Financial New York, Inc.; Norwest Financial North Carolina, Inc.; Norwest Financial North Carolina 1, Inc.; Norwest Financial North Dakota, Inc.; Norwest Financial Ohio, Inc.; Norwest Financial Ohio 1, Inc.; Norwest Financial Oklahoma, Inc.; Norwest Financial Resources, Inc.; Norwest Financial Rhode Island, Inc.; Norwest Financial Rochester, Inc.; Norwest Financial Roseville, Inc.; Norwest Financial South Carolina, Inc.; Norwest Financial South Dakota, Inc.; Norwest

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PARTIES TO THIS PROCEEDING – Continued

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Financial System Minnesota, Inc.; Norwest Financial System Oregon, Inc.; Norwest Financial System Virginia, Inc.; Norwest Financial Tennessee, Inc.; Norwest Financial Texas, Inc.; Norwest Financial Utah, Inc.; Norwest Financial Virginia, Inc.; Norwest Financial Washington, Inc.; Norwest Financial West Virginia, Inc.; Norwest Financial Wisconsin, Inc.; Norwest Financial Wyoming, Inc.; Prime Rate Premium Finance Corporation; Prime Rate Premium Finance Corporation North Carolina; Prime Rate Premium Finance Corporation Virginia); Norwest Insurance, Inc. (subsidiaries: ATI Holding Company; Crop Hail Management; Crop Risk Management, Inc.; Norwest Agencies Montana, Inc.; Abramson-Naut-Kraeger-Oas Agency, Inc.; Warranty Title, Inc.; Regency Insurance Agency, Inc.; Rural Community Insurance, Inc.; Servcorp of Yankton, Inc.); Norwest Investment Advisors, Inc.; Norwest Investment Management, Inc.; Norwest Investment Services, Inc.; Norwest Investors, Inc. (subsidiary: Norwest V.C. partners); Norwest Limited, Inc. (subsidiaries: Norwest Equity Capital, Inc.; Norwest Growth Fund, Inc. (SBIC); Norwest Venture Capital Management, Inc.); Norwest Mortgage, Inc (fka Norwest Funding, Inc.) (subsidiaries: ATI Holding Company; Keller Corp.; Norwest Mortgage Asset Management Corp.; Norwest Mortgage Insured 1, Inc.; Norwest Mortgage Insured 2, Inc.; Norwest Mortgage Conventional 1, Inc.; Norwest Mortgage Closing Services, Inc.; Norwest Mortgage of New York, Inc.); Norwest Nova, Inc.; Norwest Overseas Finance Corp.; Norwest Properties, Inc. (subsidiaries: Norwest Bank Building Company; Norwest Properties Holding Company (subsidiary: Norwest Center, Inc.)); Norwest Retail Services, Inc.; Norwest Technical Service, Inc. (formerly Norwest information Services, Inc.); P N, Inc.; Peoples Mortgage and Investment Company; Peregrine Capital Management, Inc.; Spectrum Properties, Inc. (subsidiaries: FDMC, Inc.; Teller Properties, Inc.); United Banks Financial Services Corporation; United Banks Insurance Services,

(Continued on following page)

PARTIES TO THIS PROCEEDING – Continued

Commerce Group, Inc. (succeeded by First Commerce Bancshares, Inc.)[4]

Commerce Savings Columbus, Inc.[5]

Commerce Savings Scottsbluff, Inc.[6]

Commerce Savings Lincoln, Inc. (succeeded by First Commerce Savings, Inc.)[7]

(Continued from previous page)

Inc.; United Equity Corporation; Wayzata Mortgage Company; Citizens Bancorporation, Inc.; Norwest, Inc.; Norwest, Inc.; Norwest, Inc.; Norwest Financial Corporation; United Colorado Banks, Inc.; United Financial Centers, Inc.; United Industrial Banks Corporation; United Trust Company.

[4] No parent; subsidiaries: Commerce Savings Columbus, Inc.; Commerce Savings Scottsbluff, Inc.; First Commerce Savings, Inc.; Commerce Affiliated Life Insurance, Inc.; First Commerce Investors, Inc.; First National Bank of Kearney, Nebraska; City National Bank of Hastings, Nebraska; First National Bank of West Point, Nebraska; Overland National Bank of Grand Island, Nebraska; North Platte National Bank of North Platte, Nebraska; First National Bank of McCook, Nebraska; and National Bank of Commerce Lincoln, Nebraska. National Bank of Commerce Lincoln has these subsidiaries: Peterson Building Corp.; Robert E. Schweser Co.; Commerce Court, Inc.; NBC Computer Services, Inc.; and First Commerce Mortgage Co.

[5] Parent: First Commerce Bancshares, Inc.; no subsidiaries.

[6] Parent: First Commerce Bancshares, Inc.; no subsidiaries.

[7] Parent: First Commerce Bancshares, Inc.; subsidiary: First Commerce Farm and Ranch Management, Inc.

PARTIES TO THIS PROCEEDING – Continued

Provident Federal Savings Bank.[8]

American Savings Co. (succeeded by First American Savings Bank fsb)[9]

Ken Wellman.

William Beckman.

Douglas Alford.

Alfred Adams.

Kenlon H. Hake.

Roy Ashcraft.

Darrell Anderson.

Tim Spoeneman.

Denis Appelbee.

Other parties:

S. E. Copple.[10]

Marvin Copple.[11]

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[8] No parent; no subsidiary.

[9] Parent: A.N.F. Financial Services, Inc.; subsidiary: American Investment, Inc.

[10] Mr. Copple never participated in this suit, and is now deceased. His estate is not represented in these proceedings, and it is not one of the respondents filing this joint brief.

[11] Marvin Copple is not one of the respondents submitting this joint brief. His counsel has indicated he will not file a response to the petition for writ of certiorari.

PARTIES TO THIS PROCEEDING – Continued

Union Bank & Trust Co.[12]

State Security Savings.[13]

Federal Deposit Insurance Corp.[14]

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[12] This party is not one of the respondents filing this joint brief. It has never been served with process and its counsel has indicated he will not file a response to the petition for writ of certiorari. Respondents are not aware of the parents or subsidiaries of Union Bank.

[13] Although this party was originally a defendant and its counsel was served with a copy of the petition for writ of certiorari, it is not named in the last version of the ACC's complaint. It has gone through bankruptcy proceedings and its counsel has indicated he will not file a response to the petition. Respondents are not aware of its parents or subsidiaries.

[14] The FDIC is named in the caption of the petition for writ of certiorari, but not in the latest version of ACC's complaint, and counsel for the FDIC was apparently not served with the petition. The FDIC is not one of the respondents filing this joint brief.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THIS PROCEEDING ii

TABLE OF CONTENTS xi

TABLE OF AUTHORITIES xii

STATUTES WHICH THIS CASE INVOLVES 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. Review of the ACC's standing claim is unnecessary 10

II. There was no abuse of discretion in not allowing further leave to amend before dismissing ACC's amended complaint 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES:

Burks v. Lasker, 441 U.S. 471, 99 S.Ct. 1831 (1979) 18

Foman v. Davis, 371 U.S. 178 (1962) 21

Holmes v. SIPC, 503 U.S. ___, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992)..... *passim*

H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989)..... 6

Haman v. Marsh, 237 Neb. 699, 467 N.W.2d 836 (1991)..... 17

In re Sunrise Securities Litigation, 108 B.R. 471 (E.D.Pa. 1989), *aff'd*, 916 F.2d 874 (3d Cir. 1990) 7, 8, 9, 18, 19

Kamen v. Kemper Financial Services, Inc., ___ U.S. ___, 111 S.Ct. 1711 (1991)..... 18

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985)..... 14

State v. Copple, 224 Neb. 672, 401 N.W.2d 141 (1987)..... 15

Weimer v. Amen, 235 Neb. 287, 455 N.W.2d 145 (1990)..... *passim*

Weimer v. Amen, 870 F.2d 1400 (8th Cir. 1989)..... 15

Zenith Radio v. Hazeltine Research, Inc., 401 U.S. 321 (1971).....20, 21

STATUTES AND OTHER AUTHORITIES:

Supreme Court Rule 10.1(a)..... 20

18 U.S.C. § 1964(c) 1

TABLE OF AUTHORITIES – Continued

Page

Neb. Rev. Stat. § 8-199 (1987).....1, 16

Nebraska Depository Institution Guaranty Corporation Act, *Neb. Rev. Stat.* §§ 21-17,127 *et seq.* (1987).....3

Neb. Rev. Stat. § 21-17,132 (1987).....3

Neb. Rev. Stat. § 21-17,133 (1987).....4

Neb. Rev. Stat. § 21-17,135 (1987).....4

Neb. Rev. Stat. § 21-17,136 (1987).....3

Neb. Rev. Stat. § 21-17,144 (1987).....4

Neb. Rev. Stat. § 21-17,145 (1987).....3

STATUTES WHICH THIS CASE INVOLVES

18 U.S.C. § 1964(c):

> "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

Neb. Rev. Stat. § 8-199 (1987):

> "Whenever the department has been designated receiver for an institution subject to its jurisdiction, the department shall have all the powers and privileges provided by the laws of this state with respect to any other receiver and such incidental powers as shall be necessary to carry out an orderly and efficient liquidation or reorganization of any financial institution for which the department may have become receiver, either by operation of law or by judicial appointment. Acting by and through the director, the department may in its own name as such receiver enforce on behalf of such institution or its creditors or shareholders, by actions at law or in equity, all debts or other obligations of whatever kind or nature due to such institution or the creditors or shareholders thereof. In like manner, the department may make, execute, and deliver any and all deeds, assignments, and other instruments necessary and proper to effectuate any sale of real or personal property, or the settlement of any obligations belonging or due to such financial institution for which the department may have become receiver, or its creditors or shareholders, when such sale or

> settlement is approved by the district court of the county in which such institution is located. The director shall receive no fees, salary, or other compensation for his or her services in connection with the liquidation or reorganization of such institutions other than his or her salary."

STATEMENT OF THE CASE

Plaintiff and its assignors' injuries.

Some of the facts in Petitioner's statement of the case are not in the record. The record does not support the statement that there were 7,000 depositors or the number of claimants who were assignors of ACC. More importantly the amended complaint contradicts petitioner's statement that its assignors were all depositors; ACC's assignors are a collection of different types of creditors of Commonwealth Savings Company (Commonwealth).[15] All of ACC's assignors sustained injury, however, when Commonwealth was declared insolvent and was unable to repay them. Petitioner's Appendix S-24, ¶9.

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[15] The amended complaint suggests that ACC is the assignee of an unspecified number of "owners of passbook savings accounts, certificates of indebtedness, money market accounts, individual retirement accounts, pension and welfare funds, trust accounts, promissory notes, capital notes and uncollected checks" of Commonwealth, as well as "general creditors," and personal representatives of such persons. Petitioners Appendix S-2, ¶3; *see also, id.* at S-20, ¶8F.

Commonwealth is in receivership.

Upon declaration of Commonwealth's insolvency, the Nebraska Department of Banking was appointed its receiver by, and under the supervision of, the District Court of Lancaster County, Nebraska. Petitioner's Appendix S-22, ¶J.

The Nebraska Depository Institution Guaranty Corporation.

Commonwealth's accounts were insured by the Nebraska Depository Institution Guaranty Corporation (NDIGC), a private corporation created by the Nebraska legislature to insure deposits of institutions which became members of NDIGC.[16] Petitioner's Appendix S-5 – S-6. The NDIGC was supervised by the Nebraska Department of Banking and Finance.[17] When Commonwealth and two other NDIGC member institutions failed in 1983 and 1984, the assets of NDIGC were insufficient to fully pay the insured amounts to Commonwealth's and the other institutions' creditors. Petitioner's Appendix S-6, S-9.

The defendants.

The amended complaint asserts claims against Mr. Amen, former Director of the Nebraska Department of Banking, and the former directors of the NDIGC, including S. E. Copple and Marvin Copple, two officers of

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[16] *See generally*, the Nebraska Depository Institution Guaranty Corporation Act, *Neb. Rev. Stat.* §§ 21-17,127 *et seq.*

[17] *Neb. Rev. Stat.* §§ 21-17,132; 21-17,136; 21-17,145 (1987).

Commonwealth.[18] Petitioner's Appendix S-2, S-4. Under the Nebraska statutes, all directors of the NDIGC were required to be employees of depository institutions,[19] and the ACC sued all institutions whose employees were directors, except that Commonwealth was not sued. Petitioner's Appendix S-4.

Plaintiff's theories of recovery under RICO.

The ACC's amended petition alleges that between 1979 and 1983 the defendant NDIGC board members, with the Banking Director's concurrence, set guarantees at levels which the NDIGC would not be able to cover in the event of a member's insolvency, and required member institutions to advertise to the public that their accounts were insured up to these amounts (Petitioner's Appendix S-5 – S-6 and S-8 – S-9)[20]; that Amen failed to publicly declare Commonwealth and other institutions insolvent, and the defendants allowed these institutions to become members of the NDIGC (Petitioner's Appendix S-6 – S-8); that defendants weakened NDIGC's financial position by loans and "transfers" of NDIGC funds to depository institutions to prevent their failures (Petitioner's Appendix S-10 – S-16)[21]; that Mr. Amen and S.E.

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[18] Neither of the Copples have participated in this case, and they are not among the respondents who have joined in this response.

[19] *Neb. Rev. Stat.* § 21-17,133 (1987).

[20] This advertisement was required by *Neb. Rev. Stat.* § 21-17,144 (1987).

[21] This is contemplated by *Neb. Rev. Stat.* § 21-17,135 (1987).

Copple conspired to prevent discovery of their and others' alleged criminal acts (Petitioner's Appendix S-14 – S-16); and that defendants failed to report one member's insolvency to an institution which acquired it (Petitioner's Appendix S-16 – S-17). ACC alleges that the defendants did these things in several instances because they feared the public might lose confidence in some financial institutions. The reason they wanted to prevent this, according to ACC's amended complaint, was that defendants wanted to obtain and retain deposits for institutions which employed the NDIGC board member defendants. S. E. and Marvin Copple are also accused of causing Commonwealth to become insolvent by converting its assets. Petitioner's Appendix S-21 – S-24. According to ACC, the above acts were accomplished through wire and mail fraud, and violated RICO. Petitioner's Appendix S-24 – S-25.

Plaintiff's allegation of indirect injury.

Plaintiff alleges that its assignors relied on the advertisements of NDIGC guarantees when they loaned money to or deposited it with Commonwealth, or failed to obtain their funds from Commonwealth. Petitioner's Appendix S-20, ¶8F. It alleges that:

> 9. As a direct and proximate result of the foregoing acts and omissions of the Defendants, the Plaintiffs lost their *money tendered and paid to Commonwealth* or *deposited with and retained by Commonwealth* or their *credit extended to Commonwealth,* in the Amount of $58,000,000.00.

Petitioner's Appendix S-24 (emphasis added).

The dismissal by the U.S. District Court for the District of Nebraska.

As indicated in petitioner's Petition at 5-6, this case had been appealed to the U.S. Court of Appeals for the Eighth Circuit after District Judge Lyle E. Strom had dismissed ACC's complaint for failure to allege multiple schemes establishing a pattern of racketeering under RICO. Petitioner's Appendices E & J. After the case was appealed, however, this Court announced its decision in *H.J. Inc. v. Northwestern Bell Telephone Co.*[22] The Eighth Circuit therefore remanded to the district court on November 15, 1989, for reconsideration under *H.J. Inc.* Petitioner's Appendix K. The mandate ordered the district court to certify any order on the motion to dismiss to the Court of Appeals, and stated that the appellate court retained jurisdiction for further proceedings. Petitioner's Appendix K-3.

On remand, defendants were granted leave to file amended motions to dismiss, and amended motions were filed by most of the defendants. Petitioner's Appendix G-2 – G-3. Among the grounds raised in the amended motions were whether the plaintiff had standing or whether the receiver of Commonwealth was the only person who could assert the claim, whether it had alleged "proximate cause," and whether the defendant's alleged actions were the "legal cause" of plaintiff's damages. Respondents' Appendix at 2, 6, 11. The amended motions to dismiss were heard March 9, 1990, and the district court deferred ruling until the Nebraska Supreme Court

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[22] 492 U.S. 229 (1989).

ruled on standing issues in a related case brought by the ACC in Nebraska state court.[23] Petitioner's Appendix G-3. The Nebraska Supreme Court's opinion was rendered in that case on May 11, 1990, and held that the ACC's state claims were derivative, and should properly have been asserted by the receiver of Commonwealth.[24] On June 17, 1990, plaintiff ACC moved for partial summary judgment, contending it had standing as a matter of law, and the Nebraska Supreme Court's holding that ACC's actions were derivative did not control the result in this federal action. Respondent's Appendix at 13 – 69.

On August 24, 1990, the U.S. District Court granted the defendants' amended motions to dismiss on the basis that ACC was not directly injured in its property within the meaning of RICO and therefore did not have standing. Petitioner's Appendix G-4. Relying on *In re Sunrise Securities Litigation*,[25] Judge Strom held that an indirectly injured party did not have standing under RICO, but should look to the directly injured party for recovery – in this case the Commonwealth receiver. Petitioner's Appendix G-4.

Plaintiff's attempt to amend after dismissal.

In the district court's order of August 24, 1990, the case was certified to the Eighth Circuit in accordance

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[23] *Weimer v. Amen*, Doc. 422, Page 192 (District Court of Lancaster County, Nebraska, filed Oct. 28, 1987).

[24] *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990).

[25] 108 B.R. 471 (E.D. Pa. 1971). The district court's opinion in *Sunrise Securities* was subsequently affirmed: 916 F.2d 874 (3d Cir. 1990).

with the previous mandate of the Court of Appeals. Petitioner's Appendix H-1; K-3. Thirty days later, on September 24, 1990, ACC moved for relief from the judgment under Fed. R. Civ. P. 60 so it could amend its complaint. Petitioner's Appendix M-1; N-4. The District Court denied the motion on the basis that jurisdiction was in the Court of Appeals. Petitioner's Appendix O-1.

Affirmance by the U.S. Court of Appeals for the Eighth Circuit.

The Court of Appeals affirmed the dismissal of the amended complaint on the basis of the district court's opinion, also citing the Third Circuit's opinion in *In re Sunrise Securities Litigation*,[26] and held that the district court did not abuse its discretion in denying leave to file an amended complaint. Petitioner's Appendix A-3.

SUMMARY OF ARGUMENT

First question for review: Review of the ACC's standing claim is unnecessary

Holmes v. SIPC, 503 U.S. ___, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992), disposes of the first question presented by ACC and makes it unnecessary to grant certiorari. The courts below held ACC lacked standing because it was not directly injured by the RICO violations alleged. Using this same rationale, ACC's alleged injury

[26] 916 F.2d 874 (3d Cir. 1990).

was not proximately caused by defendants' wrongdoing, according to the holding in *Holmes*.

Both Nebraska and federal law hold ACC was only indirectly injured. The Nebraska Supreme Court has held that all of Commonwealth's creditors' claims were taken over by its receiver.[27] The result under federal law is the same, whether federal common law is based on state law or other federal sources.[28] Since ACC's claim is only derivative and the Commonwealth receiver is the proper party to assert its claim, the plaintiff's loss was not proximately caused by defendant's alleged RICO violations, according to the clear holding of *Holmes*.

Second question for review: There was no abuse of discretion in not granting leave to further amend the amended complaint.

The decision not to allow further leave to amend was not an abuse of discretion, and there are no circumstances which would dictate that this issue should be reviewed by the U.S. Supreme Court.

For at least eight months before dismissal, ACC was aware defendants' amended motions to dismiss contended that the receiver was the proper party to assert ACC's alleged claim, yet it made no attempt to amend. After the Nebraska Supreme Court held ACC's claims

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[27] *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990).

[28] *Compare* the district court and court of appeals decisions in *In re Sunrise Securities Litigation*, 108 B.R. 471 (E.D.Pa. 1989), *aff'd*, 916 F.2d 874 (3d Cir. 1990).

were derivative, ACC still stood on its amended complaint in federal court, and even moved for summary judgment on the issue. Only after the district court had ruled unfavorably to ACC on the motion to dismiss and certified its ruling to the Court of Appeals did ACC ask to amend, and then by a belated motion to reconsider under Rule 60. The Court of Appeals reviewed this question and held the District Judge did not abuse his discretion.

Finally, there is no reasonable prospect that plaintiff will be able to allege it was proximately injured, as required by *Holmes v. SIPC*, and it would be fruitless to allow another opportunity to amend.

ARGUMENT

I. Review of the ACC's standing claim is unnecessary.

The first question presented by the ACC argues that it had standing to assert RICO claims against defendants. The Court's recent opinion in *Holmes v. SIPC*[29] forecloses that argument. There, the Court held that an indirect injury may not be asserted as a basis for relief under RICO, because such injury is not proximately caused by the RICO violation.[30]

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[29] 503 U.S. ___, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992).

[30] Apparently, the ACC was unaware of *Holmes* when it filed its petition. Although the ACC's petition for writ of certiorari was filed approximately two months after the Court

(Continued on following page)

In *Holmes*, the Securities Investor Protection Corporation (SIPC) asserted claims of investors whose losses were allegedly due to defendants' false representations and stock manipulation in violation of RICO; the investors' losses had occurred when their brokers became insolvent. The Court determined that SIPC's claims did not satisfy the proximate cause requirement of direct injury under RICO:

> [T]he link is too remote between the stock manipulation alleged and the customers' harm, being purely contingent on the harm suffered by the broker-dealers. That is, the conspirators have allegedly injured these customers only insofar as the stock manipulation first injured the broker-dealers and left them without the wherewithal to pay customers' claims. Although the customers' claims are senior . . . to those of the broker-dealers' general creditors, . . . the causes of their respective injuries are the same: The broker-dealers simply cannot pay their bills, and only that intervening insolvency connects the conspirators' acts to the losses suffered by the nonpurchasing customers and general creditors.
>
> As we said, however, in *Associated General Contractors*, quoting Justice Holmes, " 'The general tendency of the law, in regard to damages at least, is not to go beyond the first step.' " 459 U.S., at 534, 103 S.Ct., at 906 . . . , and the

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announced *Holmes*, ACC does not cite the opinion and appears to be unaware of the Court's holding that indirect injuries do not satisfy the proximate cause requirement of RICO. *See*, ACC's Petition at 8, 9, 13 and 14.

> reasons that supported conforming Clayton Act causation to the general tendency apply just as readily to the present facts, underscoring the *obvious congressional adoption of the Clayton Act direct-injury limitation among the requirements of § 1964(c).*[31]

The Court emphasized that the rationale for limiting recovery under the Clayton Act to those directly injured by its violation applied with equal force to RICO actions, namely: 1) allowing indirectly injured claimants to sue would require the court to determine complicated damage causation questions concerning the extent losses were caused by wrongdoers, and not by other unrelated factors; 2) the recovery would then have to be apportioned between the parties suffering direct and indirect losses; 3) directly injured parties can be expected to bring suit for the law's vindication; 4) allowing indirectly injured claimants to sue might permit them to circumvent the relative priority of their claims under applicable liquidation proceedings.[32]

The Court rejected any suggestion that its holding restricting RICO actions to directly injured plaintiffs would detract from the policies underlying the act:

> There is, for that matter, nothing illiberal in our construction: We hold not that RICO cannot serve to right the conspirators' wrongs, but merely that the nonpurchasing customers, or SIPC in their stead, are *not proper plaintiffs.* Indeed, we fear that RICO's remedial purposes

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[31] *Id.*, at ___, 112 S.Ct. at 1319-20 (citation and footnotes omitted; emphasis added).

[32] *Id.* at ___, 112 S.Ct. at 1321-22.

> would more probably be hobbled than helped by SIPC's version of liberal construction: *Allowing suits by those injured only indirectly would open the door to "massive and complex damages litigation[, which would] not only burde[n] the courts, but also undermin[e] the effectiveness of treble-damage suits." Associated General Contractors,* 459 U.S., at 545, 103 S.Ct., at 912.[33]

In the instant case, the opinion of the district court was squarely based on the ACC's failure to allege any direct injury; as a result Judge Strom held that ACC was not injured within the meaning of RICO:

> "An individual indirectly injured by a RICO violation cannot maintain a RICO action in his or her own name, since his or her claims are derivative of the directly injured parties' claims; 'an indirectly injured party should look to the recovery of the directly injured party, not to the wrongdoer for relief.' " *In re Sunrise Sec. Litigation,* 108 Bankr. 471 (E.D. Pa. 1989) (quoting *Carter v. Berger,* 777 F.2d 1173, 1176 (7th Cir. 1985)).
>
> In general, wrongs committed by a bank's officers or directors that injure all depositors and creditors alike create a liability which is an asset of the bank itself and for which only the bank or its receiver may recover. *In re Longhorn Sec. Litigation,* 573 F.Supp. 255 (W.D. Okla. 1983) (*citing Adato v. Kagan,* 599 F.2d 1111 (2d Cir. 1979)). Under such circumstances, "[t]he damage to depositors is indirect only, and it is generally recognized that for such matters, the depositor has no direct and individual right of

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[33] *Id.* at ___, 112 S.Ct at 1321 (emphasis added).

> action against the director." *Michelsen v. Penney*, 10 F. Supp. 537, 539 (S.D.N.Y. 1934) quoted in *In re Sunrise Securities Litigation*, 108 Bankr. 471 (E.D. Pa. 1989). . . .

District Court Memorandum Opinion, Petitioner's Appendix G-4.

Although the stated basis for dismissal of ACC's amended complaint was lack of standing, the reason behind the dismissal was the same as for this Court's holding in *Holmes*: an indirectly injured party is not "injured in his business or property" within the meaning of RICO.[34]

The reasons for applying the direct injury limitation are especially relevant to the instant dispute. The ACC's assignors (which ACC now suggests number 2,650[35]) are a mixed bag of Commonwealth creditors, including depositors, investors, general creditors, and payees of uncollected checks written by depositors. Petitioner's Appendix S-2. If the ACC were allowed to proceed and should it be able to establish liability, the district court would be saddled with trying to determine whether each

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[34] In *Holmes* the Court held the question of proximate cause was "fairly included" within the question of standing on which certiorari was granted for purposes of Supreme Court Rule 14.1(a). *Id.* at ___, 112 S.Ct. at 1317, n. 12. The concept of proximate cause is clearly related to standing, as Justice Marshall's dissent recognized in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 512, 105 S.Ct. 3275, 3299, 87 L.Ed.2d 346 (1985):

> Court-developed standing rules define the requisite proximity between the plaintiff's injury and the defendant's . . . violation. . . .

[35] ACC's petition at 3, n. 2.

individual's damages resulted from alleged misconduct which ACC urges against the defendants or from causes such as the economic climate which gave rise to financial weakness of Commonwealth, or embezzlement by Commonwealth's officers which was separate and distinct from the RICO violations alleged against other defendants.[36] These are exactly the types of problems which compelled the Court to limit RICO plaintiffs to those who have suffered direct injury.

Preventing the ACC from pursuing its indirect injuries is also consistent with the Court's desire to limit priority circumvention. The Nebraska Supreme Court expressed the same concern when it rejected the ACC's constitutional challenge to the state's receivership statutes:

> The statutory scheme of a receivership seeks to avoid preferences among creditors, to avoid a multiplicity of lawsuits and races to the courthouse, and to give the receiver meaningful authority to pursue claims, negotiate compromise settlements, and execute binding releases. . . . We have determined that § 8-199 allows the receiver to enforce the appellants' causes of action. . . . [T]he enforcement of those rights is given to the receiver (pursuant to the Legislature's power to do so) in order to secure

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[36] Both S.E. and Marvin Copple were convicted of wrongdoing after the Commonwealth collapse. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987); *see, Weimer v. Amen*, 870 F.2d 1400 (8th Cir. 1989).

> compensation for all creditors in an equitable and nonpreferential manner.[37]

Finally, if there were grounds for a RICO suit, there is no reason that the directly injured party could not have pursued it. The Commonwealth receiver, as the person statutorily responsible for collecting claims owing to Commonwealth and its creditors, including ACC, could have asserted an action under RICO, and any recovery would redound to the benefit of corporate creditors in the proper priority, as determined by the receivership court. As the Court reasoned in *Holmes*:

> In sum, subrogation to the rights of the manipulation conspiracy's secondary victims does, and should, run afoul of proximate-causation standards, and SIPC must wait on the outcome of the trustees' suit. If they recover from Holmes, SIPC may share according to the priority SIPA gives its claim.[38]

Similarly, here the ACC's claim on behalf of Commonwealth creditors was not proximately caused by the alleged RICO violations of the respondents. The receiver of Commonwealth is entitled to pursue those claims under *Neb. Rev. Stat.* § 8-199 (1987).[39] If the receiver had chosen to sue under RICO and had been successful, ACC

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[37] *Weimer v. Amen, supra,* 235 Neb. at 299-300, 455 N.W.2d at 154.

[38] *Holmes, supra,* at ___, 112 S.Ct. at 1321.

[39] This statute is set forth under "Statutes Which This Case Involves" in the preliminary portion of this brief.

would be entitled to share in that recovery according to the priority of its assignors' claims.[40]

It is likely that if the ACC had been aware of the Court's decision in *Holmes* it would have attempted to justify its petition by asserting that it was directly injured by defendants, even though it is clear that its damages only arise because of Commonwealth's inability to satisfy the claims of its creditors. The argument the ACC was directly injured has already been rejected by the federal district court,[41] the Court of Appeals for the Eighth Circuit,[42] and the state district and supreme courts.[43] Although there may be a question about which law applies to determine the question, there can be no doubt that the injuries asserted by ACC are indirect under both state law and the federal opinions on the subject.

While federal law governs RICO actions, the source of federal common law on the question of whether a claimant's injury is direct or indirect is not definitely

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[40] Although the Commonwealth receiver has not sued the defendants, that does not detract from the reasons for holding that the ACC's alleged injury was not proximately caused by the alleged RICO violations. Instead, it is likely that the receiver's decision not to bring an action against these parties represents a realistic and rational assessment of the chances of succeeding in such an action. *See, e.g.*, footnotes 20 and 21, *supra*. In fact, the Nebraska Supreme Court has characterized the ACC's claims as "relatively worthless." *Haman v. Marsh*, 237 Neb. 699, 720, 467 N.W.2d 836, 851 (1991).

[41] Petitioner's Appendix G.

[42] Petitioner's Appendix A.

[43] *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990).

settled. For example, in *In re Sunrise Securities Litigation*,[44] the district court concluded the federal common law that determined whether the claim of a depositor in a failed bank was derivative or direct was set forth in federal courts' decisions.[45] The court noted, however, that the law of Florida, where the claim arose, was consistent with federal law on the issue.[46] On appeal of *Sunrise Securities*, the Third Circuit affirmed the lower court, but disagreed with the lower court's conclusion on the source of law to be applied, holding that state corporate law determined whether the claim was derivative, relying on *Burks v. Lasker*, 441 U.S. 471, 477-78, 99 S.Ct. 1831, 1836-37 (1979).[47] The appellate court opinion also made it clear, however, that the result would be the same under the federal decisions.[48]

In the instant matter, District Judge Strom relied on the lower court opinion in *In re Sunrise Securities* to find that the ACC's claim was indirect, but noted that the result was consistent with the Nebraska Supreme Court's decision in *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990).[49] In affirming this case, the Eighth Circuit relied

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[44] 108 B.R. 471 (E.D. Pa. 1989).

[45] *Id.* at 476, n. 6.

[46] *Id.*

[47] *In re Sunrise Securities Litigation*, 916 F.2d 874, 879 (3d Cir. 1990); *see also, Kamen v. Kemper Financial Services, Inc.*, ___ U.S. ___, 111 S.Ct. 1711 (1991).

[48] *In re Sunrise Securities Litigation, supra*, 916 F.2d at 880-81.

[49] District Court's Memorandum Opinion, Petitioner's Appendix G-5 – G-6.

on Judge Strom's opinion, and also cited the Third Circuit's opinion in *Sunrise Securities.*[50]

Here, there is no need to decide whether federal or state law governs the determination of whether the claims of creditors in a failed bank are indirect. As a comparison of the Nebraska court's opinion in *Weimer v. Amen* with the federal district court's and Third Circuit's opinions in *Sunrise Securities* makes clear, Nebraska law and federal law are the same; in fact, the Nebraska court relied on the district court opinion in *In re Sunrise Securities Litigation, supra,* to conclude that ACC's claim was derivative under Nebraska law.[51] Both state and federal law therefore clearly hold ACC was indirectly injured. As such, ACC's damages were not proximately caused by the RICO violations it has alleged.

In short, *Holmes* has already determined the issues which ACC has identified in its first question for review. In the instant case, as in *Holmes*, the ACC's assignors' losses occurred only because of Commonwealth's insolvency; if Commonwealth had been able to pay its debts, ACC's assignors would not have been damaged, regardless of whether defendants violated RICO. As in *Holmes*, injury to Commonwealth's creditors, including ACC's assignors, is connected to defendants' alleged wrongdoing only by the failure of Commonwealth. As such, the ACC's alleged damages are indirect, and not proximately caused by the alleged RICO violations.[52] With the

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[50] Court of Appeals Opinion, Petitioner's Appendix A-3.

[51] *Weimer v. Amen*, 235 Neb. at 297, 455 N.W.2d at 153.

[52] *Holmes, supra,* at ___, 112 S.Ct. at 1319.

guidance of *Holmes* now available, there is no need for review. The Court's decision in *Holmes* makes it clear that the decisions below were entirely correct.

II. There was no abuse of discretion in not allowing further leave to amend before dismissing ACC's amended complaint.

Petitioner also seeks to have this Court review whether it was proper to dismiss its amended complaint without leave to amend. There is no important or special reason why this Court should consider that issue, as required by Supreme Court Rule 10.1(a).

The decision of whether leave to amend should be granted is committed to the discretion of the district court.[53] The Court of Appeals has already reviewed the question and found the trial court did not abuse its discretion in this regard. Petitioner's Appendix A-3.

ACC was well aware of the defendants' contentions that the receiver of Commonwealth was the proper party to assert these claims, since defendants had successfully raised this defense in their state court suit.[54] Subsequently the issue was brought to a head in the instant matter by defendants' filing of amended motions to dismiss in December of 1989. Respondents' Appendices 1, 2 and 3. The federal district judge announced that he would await ruling on the issue of standing until the

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[53] *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 328 (1971).

[54] *Weimer v. Amen*, 235 Neb. 287, 290, 455 N.W.2d 145, 149 (1990).

Nebraska Supreme Court decided the appeal of the state court action. When that appeal was decided it was adverse to the ACC; the Nebraska court held creditors' claims had to be asserted by the receiver of Commonwealth.[55] Although the handwriting was thus clearly on the wall, ACC did not attempt to amend its federal complaint. Instead it moved for summary judgment on the issue. Respondents' Appendix 4.

Even after the district court had dismissed the amended complaint, ACC took no action to attempt to amend in a timely way. Thirty days after the case had already been certified to the Court of Appeals, the ACC finally moved for relief under Rule 60.

Obviously, ACC's belated motion for relief from the judgment was both dilatory and late. Moreover, it came after the respondents and the district court had expended considerable time and resources addressing the ACC's intransigent contention that it, and not the Commonwealth receiver, was the proper party to raise its RICO claims. Under these circumstances it was not an abuse of discretion to dismiss the amended complaint without granting leave to amend.[56]

Finally, it is patent that any injuries to the Commonwealth creditors who are the assignors of ACC are indirect, as discussed in our argument on ACC's first question. ACC cannot, therefore, allege that its damages were proximately caused by a RICO violation. *Holmes v.*

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[55] *Id.* at 296-98, 455 N.W.2d at 152-53.

[56] *Zenith Radio Corp. v. Hazeltine Research, Inc.*, *supra*, at 330-32; *see, Foman v. Davis*, 371 U.S. 178, 182 (1962).

SIPC, supra. For this reason, it would serve no useful purpose to allow further amendment.

CONCLUSION

The questions which the Petitioner would have this Court review are already well-settled by the Court's prior opinions. The amended complaint was properly dismissed for failure to allege a claim under RICO, and there was no abuse of discretion in not giving plaintiff leave to further amend.

Accordingly the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CLAUDE T. WEIMER, for Himself; and ASSOCIATION OF COMMONWEALTH CLAIMANTS, an Unincorporated Association, Plaintiffs, vs. PAUL AMEN; S. E. COPPLE; MARVIN COPPLE; and MEMBERS OF THE NEBRASKA DEPOSITORY INSTITUTION GUARANTY CORPORATION, Defendants.	CV 86-L-248 **AMENDED MOTION TO DISMISS AMENDED COMPLAINT OR FOR MORE DEFINITE STATEMENT, AND MOTION FOR SEPARATE TRIALS** (Filed Dec. 22, 1989)

COME NOW Defendants, Kenneth Wellman, William Beckman, Douglas Alford, Alfred Adams, Kenlon Hake, Roy Ashcraft, Darrell Anderson, Timothy Spoeneman, and Denis Applebee, and hereby move the Court as follows:

1. For an order dismissing the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted for, without limitation, the following reasons:

A. The amended petition fails to satisfy the essential elements of a claim under RICO.

(1) Plaintiffs have not adequately alleged a "pattern" of racketeering activity;

(2) Plaintiffs have not adequately alleged proximate cause;

(3) Plaintiffs have not adequately alleged the existence of an "enterprise";

(4) Plaintiffs have not adequately alleged that Defendants "conducted" the affairs of the purported enterprise;

(5) Plaintiffs have not adequately alleged valid predicate acts;

(6) Plaintiffs have not adequately alleged predicate acts with sufficient particularity; and

(7) Plaintiffs have not adequately alleged the requisite elements of a conspiracy.

B. Plaintiffs are without standing to assert the claims set forth in the amended complaint, and are collaterally estopped from asserting that standing for such claims is proper with anyone other than the Receiver of Commonwealth;

C. To the extent that RICO permits an action against these defendants for engaging in a "patter of racketeering activity," RICO fails to set forth prohibited conduct with sufficient definiteness, is unconstitutionally vague and denies defendants due process.

D. The Court should abstain from exercising jurisdiction to apply RICO in a case such as this, which involves a systematically regulated state concern.

E. Defendants are immune from liability, as all activities alleged to have been undertaken were in the performance of their powers

and duties as directors of the Nebraska Depository Institution Guaranty Corporation.

2. Alternatively, Defendants move the Court pursuant to Federal Rule of Civil Procedure 12(e) for an order requiring the Plaintiffs to make their amended complaint more definite and certain in the particulars discussed in Defendants' original motion to dismiss the amended complaint.

3. Defendants also move the Court pursuant to Federal Rule of Civil Procedure 42(b) for an order granting separate and severed trials for each Defendant.

Dated this 22nd day of December 1989.

KENNETH WELLMAN, WILLIAM BECKMAN, DOUGLAS ALFORD, ALFRED ADAMS, KENLON HAKE, ROY ASHCRAFT, DARRELL ANDERSON, TIMOTHY SPOENEMAN, and DENIS APPLEBEE, Defendants,

By /s/ Gerald P. Laughlin
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Steven D. Davidson (#18684)
of BAIRD, HOLM, McEACHEN, PEDERSEN, HAMANN & STRASHEIM
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Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Amended Motion to Dismiss Amended Complaint or for More Definite Statement, and Motion for Severance was served upon they [sic] following parties by regular United States mail, first-class postage prepaid, on this 22nd day of December 1989.

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Mr. Charles D. Humble
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APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CLAUDE T. WEIMER, et al., Plaintiffs, v. PAUL AMEN, et al., Defendants.	CASE NO. CV. 86-L-248. AMENDED MOTION OF PROVIDENT FEDERAL SAVINGS BANK FOR DISMISSAL OF PLAINTIFFS' (Filed Dec. 21, 1989)

COMES NOW the defendant, Provident Federal Savings Bank pursuant to the provisions of Rule 12(b)(6) of the Federal Rules of Civil Procedure and the Court's Order of December 11, 1989, and moves the Court for an order dismissing the plaintiffs' Amended Complaint for the reasons that the Association of Commonwealth Depositors lacks standing; that the plaintiffs' claim for relief, if any, is barred by the statute of limitations; that the Amended Complaint fails to state a claim upon which relief may be granted against Provident Federal Savings Bank; and for the further reason that 18 U.S.C. § 1962 and 1964 are unconstitutional under the Due Process Clause of the United States Constitution.

In accordance with the Court's order of December 11, 1989, a brief in support of this Motion for Dismissal will be filed and served upon opposing counsel on or before January 22, 1990.

Dated this 21st day of December, 1989.

PROVIDENT FEDERAL SAVINGS BANK, Defendant,

BY: CROSBY, GUENZEL, DAVIS, KESSNER & KUESTER
Attorneys at Law

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Telephone (402) 475-5131

By /s/ William D. Kuester
William D. Kuester (12342)
One of Said Attorneys

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a true and correct copy of the foregoing Amended Motion of Provident Federal Savings Bank for Dismissal of Plaintiffs' Complaint to be served on the following parties, by mailing a copy thereof by United States Mail, postage prepaid, on the 21st day of December, 1989, to the following:

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/s/ William D. Kuester
William D. Kuester

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CLAUDE T. WEIMER, et al., Plaintiffs,	)	CV. 86-L-248.
v.	)	
PAUL AMEN, et al., Defendants.	)	

AMENDED MOTION TO DISMISS OF COMMERCE GROUP, INC., COMMERCE SAVINGS LINCOLN, INC., COMMERCE SAVINGS COLUMBUS, INC., COMMERCE SAVINGS SCOTTSBLUFF, INC. FIRST SAVINGS COMPANY OF GRAND ISLAND, FIRST NATIONAL BANK OF GRAND ISLAND, AND NORWEST CORPORATION

(Filed Dec. 22, 1989)

COME NOW the above-named defendants ("Defendants") and hereby move the Court for an Order pursuant to Federal Rule of Civil Procedure 12(b)(6) dismissing the amended complaint herein for the reason that it fails to state a claim upon which relief may be granted, including, without limitation, in the following respects:

1. The amended complaint fails to properly allege a claim under the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961, et seq.;

2. The plaintiffs do not have standing to maintain this action.

3. RICO, to the extent that it permits an action against these Defendants for engaging in what is alleged to be a "pattern of racketeering activity", is so vague and overbroad as to deny these defendants of due process under the Fifth Amendment to the United States Constitution, and for such reason is unconstitutional.

4. The Defendants cannot be held responsible for the acts of the NDIGC directors.

5. The actions of the Defendants are immune from the alleged claims.

6. The plaintiffs' pendent state claims are not properly before the Court.

7. The Defendants' actions were not the legal cause of the plaintiffs' damages.

A separate brief in support of this Motion will be submitted on or before January 22, 1990.

FIRST SAVINGS COMPANY OF GRAND ISLAND, FIRST NATIONAL BANK OF GRAND ISLAND, and NORWEST CORPORATION, Defendants

COMMERCE GROUP, INC., COMMERCE SAVINGS LINCOLN, INC., COMMERCE SAVINGS COLUMBUS, INC., and COMMERCE SAVINGS SCOTTSBLUFF, INC., Defendants

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APPENDIX 4

UNITED STATES DISTRICT COURT
NEBRASKA DISTRICT

CLAUDE T. WEIMER, ET AL.,	)	CASE NO.
vs.	)	CV86-L-248
	)	
PAUL AMEN, ET AL.,	)	(Filed July 19, 1990)

****

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

****

The Plaintiff, ASSOCIATION OF COMMONWEALTH CLAIMANTS (ACC), requests summary judgment under Federal Rules of Civil Procedure Rule 56, that ACC has standing to maintain this action. In support of this Motion, ACC shows the Court that as to this proposition there is no genuine issue as to any material fact, and ACC is entitled to judgment as a matter of law. ACC in support of this Motion, offers into evidence Exhibits 1990-A and 1990-B, attached to this Motion.

Respectfully submitted,

ASSOCIATION OF COMMONWEALTH CLAIMANTS, Plaintiff

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UNITED STATES DISTRICT COURT
NEBRASKA DISTRICT

CLAUDE T. WEIMER, ET AL.,	)	
vs.	)	CASE NO.
	)	CV-86-L-248
PAUL AMEN, ET AL.,	)	

****

CERTIFICATE OF SERVICE

****

Copies of the Motion For Partial Summary Judgment and the Brief in support of the motion were mailed on July 17, 1990, to the following attonreys [sic]:

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/s/ Robert R. Gibson
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Exhibit 1990-A

DISTRICT COURT OF
LANCASTER COUNTY, NEBRASKA

CLAUDE T. WEIMER, for Himself and ASSOCIATION OF COMMONWEALTH CLAIMANTS, an Unincorporated Association,	)	DOCKET 422 PAGE 192
Plaintiffs,	)	
vs.	)	
PAUL AMEN, MEMBERS OF THE NEBRASKA DEPOSITORY INSTITUTION GUARANTY CORPORATION, et al., (Described in Exhibit A)	)	
Defendants.	)	

****

AMENDED PETITION

****

PARTIES

1. The Plaintiff, CLAUDE T. WEIMER (Weimer) is a citizen and resident of Lincoln, Lancaster County, Nebraska, and President of the Association of Commonwealth Claimants (ACC).

2. The Plaintiff, ACC, is an unincorporated association in Lincoln, Lancaster County, Nebraska. ACC brings these causes of action as the assignee of creditors of Commonwealth Savings Company of Lincoln (Commonwealth). The assignments are in writing, filed with the amended petition, and incorporated in the amended petition by reference. Exhibit 1 attached to the amended petition is also incorporated in the amended petition by reference. Exhibit 1 states the

number of each cause of action, the name of each assignor whose cause is assigned, and the date of the assignment. The causes of action of each assignor, assigned to ACC, incorporate by reference the allegations of paragraph 1, paragraphs 3 through 64, and the Prayer For Relief of the amended petition.

3. The Defendant, PAUL AMEN (Amen), is a citizen and resident of Lincoln, Lancaster County, Nebraska. Amen was director of the Department of Banking and Finance of the State of Nebraska from January 6, 1979 to November 1, 1983.

4. The Defendants, Kenneth A. Wellman (Wellman); William C. Beckman (Beckman); Douglas G. Alford (Alford); Alfred H. Adams (Adams); Kenlon H. Hake (Hake); Roy L. Ashcraft (Ashcraft); Darrell D. Anderson (Anderson); Timothy R. Spoeneman (Spoeneman); Denis K. Applebee (Applebee); Herbert Heumann (Heumann); and Allan C. Roemmich (Roemmich) were at various times Directors of the Nebraska Depository Institution Guaranty Corporation (NDIGC).

5. A. Commerce Savings Columbus, Inc., became a member of NDIGC August 6, 1979, and was the employer of Wellman from then until at least May 25, 1982.

B. Commerce Savings Lincoln, Inc., became a member of NDIGC August 6, 1979, and employed Alford as its President from at least August 6, 1979, to the present.

C. Commerce Savings Scottsbluff, Inc., became a member of NDIGC August 6, 1979, and employed Spoeneman as its President from at least August 6, 1979, to the present.

6. A. First National Bank of Grand Island merged with First Savings Company of Grand Island (First Savings) on April 13, 1984. First Savings became a member of NDIGC on August 6, 1979, and employed Beckman as its Senior Vice President and Chief Executive Officer from at least August 6, 1979, to at least October 27, 1983.

   B. Provident Federal Savings Bank (Provident) merged with Liberty Savings Company (Liberty) on November 18, 1983. Liberty became a member of NDIGC on August 6, 1979, and employed Applebee as its President from at least August 6, 1979, to at least November 1, 1983.

   C. Union Bank & Trust Company (Union) merged with Northeast Savings & Investment Co. (Northeast) on November 18, 1983. Northeast became a member of NDIGC on August 2, 1979, and employed Heumann as its President from at least August 2, 1979, until November 15, 1983.

   D. American Security Bank (American Security) merged with American State Savings Company (American State) on July 14, 1983. American State became a member of NDIGC August 3, 1979, and employed Ashcraft as its Executive Vice President from at least August 3, 1979, until at least August 26, 1983.

7. The Defendants named in this paragraph 7, knowingly joined the conspiracy described in paragraphs 31 through 38 below. They are Nebraska banking corporations and Nebraska residents, as follows:

   A. Omaha National Bank & Trust Co., Omaha, Nebraska (Omaha National);

   B. First National Bank of Omaha, Omaha, Nebraska (First National Omaha);

C. Dennis O'Neal (O'Neal), Omaha, Nebraska, employed by First National Omaha;

D. Robert Short (Short), Omaha, Nebraska;

E. Barry Lake (Lake), Lincoln, Nebraska, Counsel for the Department of Banking and Finance of the State of Nebraska between January 6, 1979 and November 1, 1983;

F. James Moylan (Moylan) executive director of NDIGC.

JURISDICTION

8. This action arises from acts, omissions, and representations of the Defendants named in paragraphs numbered 3 through 7 above, in the course and scope of their employment or corporate operations in Nebraska described in paragraphs numbered 3, 4, 5, 6, and 7 above. The Plaintiff, ACC, is an assignee as defined in Section 25-302, R.R.S. Neb. 1943 and an unincorporated association as defined in Section 25-313, R.R.S. Neb. 1943. ACC was formed for the following purposes:

A. To call attention to facts and law related to the insolvency of Commonwealth; and

B. To receive, hold, and act upon assignments of causes of action arising from the insolvency of Commonwealth.

This action arose in Lancaster County, Nebraska within the meaning of Section 25-404, R.R.S. Neb. 1943 (action against a public officer). In addition, three of the Defendant corporations have their principal places of business in Lancaster

County, Nebraska within the meaning of Section 25-405, R.R.S. Neb. 1943 (actions against domestic

corporations). The Defendants Amen, Alford, Adams, Hake, Heumann, and Lake have their places of residence in Lancaster County, Nebraska.

9. Various Defendants became directors of NDIGC and remained directors as follows:

NAME	BEGINNING DATE	END OF TERM
Adams	before 02/01/79	08/16/85
Alford	08/28/81	resigned between 11/01/83 and 12/01/83
Anderson	before 02/01/79	resigned 01/08/82
Applebee	before 02/01/79	resigned between 11/01/83 and 12/01/83
Ashcraft	before 02/01/79	resigned 08/26/83
Beckman	02/23/82	resigned 10/27/83
Hake	before 02/01/79	08/23/84
Heumann	09/01/83	resigned 11/15/83
Roemmich	before 02/01/79	08/16/83
Spoeneman	08/28/81	08/27/85
Wellman	before 02/01/79	05/25/82

CHRONOLOGY OF ACTS, OMISSIONS AND REPRESENTATIONS

10. The NDIGC in 1978 was chartered as a corporation in accordance with the NDIGC Act (Sections 21-17,127 through 21-17,145, R.R.S. Neb. 1943).

11. On January 6, 1979, Amen was appointed Director of the Nebraska Department of Banking and Finance. Amen continued in this office until after November 1, 1983.

12. In February 1979, Amen, Moylan, and NDIGC directors Adams, Anderson, Applebee, Ashcraft, Hake, Roemmich, and Wellman, acting in concert, developed and caused NDIGC to adopt and implement a plan. This plan required NDIGC member institutions to advertise that each deposit account in the member institutions was guarantied [sic] by NDIGC against loss up to $10,000.00. At the time this plan was adopted and implemented by NDIGC, Amen and the named Directors knew that NDIGC had insufficient assets to make good this guaranty.

13. By August 1, 1979, Amen knew that both American Savings Company of Omaha (American Savings) and Commonwealth were financially unsound and that these institutions should be declared insolvent. Amen failed to declare either institution insolvent, failed to take control of the assets and affairs of either institution, and failed to remove officers from control of either institution. Amen also failed to disclose to the public the condition of American Savings and Commonwealth.

14. On August 7, 1979, American Savings and Commonwealth were admitted to membership in NDIGC. Directors Adams, Anderson, Applebee, Ashcraft, Hake, Roemmich, and Wellman failed to examine or

consider the economic advisability of admitting to membership American Savings and Commonwealth.

15. Between August 7, 1979 and November 1, 1983, Amen, Lake, Moylan, and all NDIGC directors were guilty of the following omissions:

    A. They failed to disclose the insolvency of American Savings and Commonwealth;

    B. They took no action to declare either American Savings or Commonwealth insolvent;

    C. They took no steps to gain control of the assets and affairs of American Savings and Commonwealth;

    D. They took no action to remove or bring about removal of officers of American Savings and Commonwealth;

    E. They took no action to prevent or terminate membership in NDIGC by American Savings and Commonwealth.

    Between August 1, 1979 and November 1, 1983, Amen, Lake, Moylan, and all Directors of NDIGC were bound to know that American Savings and Commonwealth were unsound and insolvent, and that officers of American Savings and Commonwealth were acting in violation of laws of Nebraska.

16. On April 28, 1980, Amen, Moylan, and NDIGC directors Adams, Anderson, Applebee, Ashcraft, Roemmich, and Wellman caused NDIGC to adopt and implement a new member deposit guaranty. Under the new guaranty, member institutions were directed to and did advertise that each member institution deposit account was guarantied against loss up to $30,000.00. This was done even though

Amen, Moylan, and these directors knew the following:

A. That NDIGC assets were insufficient to make good this guaranty in the event of failure of a large member institution; and

B. That American Savings and Commonwealth were large insolvent member institutions.

17. On July 7 and July 16, 1982, Amen, Moylan, and NDIGC Directors Adams, Alford, Applebee, Ashcraft, Hake, Roemmich, and Spoeneman acting in concert implemented a plan to use NDIGC funds to prevent the declared insolvency of Industrial Savings Company of Omaha (Industrial Savings). Industrial Savings was not a member of NDIGC. Stockholders of Industrial Savings included the following:

S.E. Copple (president of Commonwealth);

First Security Savings Company (S.E. Copple, President);

First Savings Company (employer of Beckman);

State Security Savings (employer of Hake and Adams);

Commonwealth (employer of S.E. Copple and his son, Marvin Copple);

American Savings Company (owned by Short; formerly owned by Anderson); and

Commerce Savings Lincoln, Inc. (employer of Alford).

These stockholders were informed by Amen that Industrial Savings would have to be declared insolvent unless the stockholders invested additional capital, or some other source of new capital was

found. The plan implemented July 7 and July 16, was as follows:

A. NDIGC-member American Savings acquired Industrial Savings by merger, and absorbed Industrial Savings' deficit of $1,200,000.00;

B. Omaha National Bank loaned American Savings $450,000.00 to use on its books as capital;

C. NDIGC advanced $500,000.00 to American Savings in exchange for a capital note;

D. NDIGC loaned American Savings $700,000.00 against questionable and classified assets of Industrial Savings;

E. Amen permitted American Savings to capitalize on its books as "good will" Industrial Savings' $1,200,000.00 deficit, and to capitalize on its books the amounts described in subparagraphs 17B and C above, in order to give American Savings the appearance of an acceptable ratio of capital to liabilities.

As a consequence of these acts, done in furtherance of the plan, neither Industrial Savings nor American Savings were declared insolvent. Both institutions were in fact insolvent, but these acts unlawfully diverted NDIGC funds for the benefit of stockholders of a non-member of NDIGC and allowed a misstatement of the assets and liabilities of American Savings.

18. On December 22 and 23, 1982, Amen, Moylan, and NDIGC Directors Adams, Applebee, Ashcraft, Beckman, Hake, Roemmich, and Spoeneman, acting in concert, transferred to the Dwight Cooperative Credit Association (Dwight Coop) about $600,000.00

from the NDIGC deposit guaranty fund. This transfer was not for the purpose of paying covered claims under the NDIGC Act and was contrary to the provisions of Sections 21-17,128; 21-17,131; and 21-17,135, R.R.S. Neb. 1943.

19. About April 10, 1983, Amen, Lake, O'Neal, Moylan, and NDIGC Directors Adams, Applebee, Ashcraft, Beckman, Hake, Roemmich, and Spoeneman, acting in concert, caused to be transferred $800,000.00 from NDIGC deposit guaranty funds to a non-member institution, First National Omaha. This transfer was not for payment of covered claims under the NDIGC Act and was contrary to the provisions of Sections 21-17,128; 21-17,131; and 21-17,135, R.R.S. Neb. 1943.

PROXIMATE CAUSE

20. On November 1, 1983, Commonwealth was declared insolvent by the Department of Banking and Finance of the State of Nebraska. Commonwealth creditors lost more than $58,000,000.00 in deposits, investments, and credits as a direct consequence of the insolvency of Commonwealth. The creditors of Commonwealth had left their money in the care of Commonwealth and made additional investments and deposits in Commonwealth because of the following:

A. Misrepresentations of the Defendants concerning the facts about the security of Commonwealth deposits as described above in paragraphs 12, 14 and 16;

B. Failure of the Defendants to disclose material facts about the security of Commonwealth deposits as described above in paragraphs 12 through 19;

C. Representations of the defendants made with reckless disregard of the truth or falsity of the representations, concerning the security of Commonwealth deposits, as described above in paragraphs 12, 14, and 16.

D. Breach of the duty of disclosure by the Defendants as fiduciaries of the Plaintiffs, as described above in paragraphs 12 through 19;

E. Fraudulent, wanton, and willful diminution of the NDIGC deposit guaranty fund by the Defendants as described above in paragraphs 13, 15, and 17 through 19, and the consequent diminution of reimbursement from NDIGC funds to Commonwealth creditors;

F. Omissions by Defendants as described in paragraph 15 above.

The Commonwealth creditors received reimbursement from NDIGC for about $2,500,000.00. NDIGC now has no assets and is inoperative. The acts, omissions, and representations of NDIGC directors described in paragraphs 12 through 19 above, and the acts of Dennis O'Neal described in paragraph 19 above, were in furtherance of the corporate polices [sic] and financial interests of their corporate employers, as follows:

A. Each of the NDIGC directors, and O'Neal were authorized by their respective employers to act for the employers, and were high-level executives of the employers responsible for formulating corporate policies of the employers;

B. The acts of the NDIGC Directors and of O'Neal were done for the purposes of transferring money and attracting investments in their corporate employers, and of preventing public disclosure of wrongful acts described in paragraphs 12 through 19 above.

21. But for the acts, omissions, and representations of the Defendants described above in paragraphs 12 through 19, defalcations of Commonwealth officers and directors, and the insolvency of Commonwealth would have been discovered in early 1979. The losses of Commonwealth creditors, if any, would have been substantially less in early 1979 than on November 1, 1983.

CAUSES OF ACTION

Each of the assignors described in Exhibit 1, assigned to ACC at least the following causes of action:

I. FIRST CAUSE OF ACTION: FRAUD

22. The Plaintiffs incorporate in this First Cause of Action the allegations of paragraphs 1 through 21 above.

23. The Defendants' representations to the general public (described above in paragraphs 12 and 16) implied that NDIGC had sufficient assets to make good on the guaranties described in paragraphs 12 and 16. By admitting Commonwealth to NDIGC membership, the Defendants, named in paragraphs 14 and 15 above, impliedly represented that Commonwealth was solvent. These same defendants'

representations were false when made and the Defendants knew them to be false. The Defendants fraudulently intended the general public, including Commonwealth creditors, to rely upon these representations in deciding whether to make and leave deposits and investments in NDIGC member institutions, including Commonwealth. Commonwealth creditors reasonably relied upon these representations and as a consequence made and left deposits and investments in Commonwealth. The value of these deposits and investments finally was lost to Commonwealth creditors when NDIGC failed to make good on the guaranties. Plaintiffs were damaged in the manner described in paragraphs 20 through 21 above.

II. SECOND CAUSE OF ACTION: CONSTRUCTIVE FRAUD

24. The Plaintiffs incorporate in this Second Cause of Action the allegations of paragraphs 1 through 23.

25. The representations described in paragraph 23 above, were made with reckless disregard for the truth or falsity of the representations.

26. The Defendants named in paragraphs 12 through 19 above, had actual knowledge of facts, as described in paragraphs 12 through 19 above, material to the decisions of Commonwealth creditors whether to make and leave deposits and investments in Commonwealth. These Defendants knew these facts not to be within reach of reasonably diligent attention, observation, and judgment of the Commonwealth creditors.

27. The breaches of duty described in paragraph 28 below, tended to deceive the public, to violate public and private confidence, and to injure public interest.

28. By reason of the Defendants' breach of their duties to disclose material facts and not to make representations with reckless disregard of their truth or falsity, Commonwealth creditors were deceived to believe their deposits and investments in Commonwealth were secure. As a proximate consequence. Commonwealth creditors unwittingly became and remained vulnerable to loss of their deposits and investments in Commonwealth which occurred on and after November 1, 1983. In this way, Plaintiffs were damaged in the manner set forth in paragraphs 20 and 21 above.

III. THIRD CAUSE OF ACTION: CIVIL CONSPIRACY

29. The Plaintiffs incorporate in this Third Cause of Action the allegations of paragraphs 1 through 28.

30. Sometime during January 1979, the Defendants Amen, Moylan, Adams, Anderson, Applebee, Ashcraft, Hake, Roemmich, and Wellman combined or agreed to join together to accomplish the following unlawful purposes:

A. To conceal from the general public the true financial condition of NDIGC;

B. To lead the general public to believe incorrectly that all NDIGC member institutions were safe and secure depositories for funds;

C. To conceal from the general public the fact that if a large NDIGC member institution was declared insolvent, NDIGC did not have enough money or reinsurance to pay its deposit guaranties.

D. To induce deposits and investments in NDIGC member institutions;

E. To prevent public perception of the unsoundness of industrial loan and investment companies, in order to avoid withdrawals from NDIGC member institutions.

In pursuit of these purposes, these Defendants established the deposit guaranty advertising rules described in paragraph 12 above.

31. About August 7, 1979, the conspiracy described in paragraph 30 above, was enlarged by the same Defendants to incorporate an additional unlawful purpose. This additional purpose was to conceal from the general public the fact that American Savings and Commonwealth were financially unsound. In pursuit of the purposes of the conspiracy these Defendants undertook the acts, omissions, and representations described in paragraphs 13, 14, and 15 above.

32. About April 28, 1980, Amen, Moylan, Adams, Anderson, Applebee, Ashcraft, Roemmich, and Wellman enlarged the conspiracy described in paragraphs 30 and 31 above, to incorporate additional unlawful purposes. These additional purposes were to increase the confidence of the general public in NDIGC-member institutions by creating a false impression of security and to make them appear more attractive as depositories for funds. In pursuit of the purposes of the conspiracy, the Defendants named in this paragraph 32 undertook the acts, omissions, and representations described in paragraph 16 above.

33. Before July 1, 1982, Spoeneman knowingly became a member of the conspiracy described in paragraphs

30, 31, and 32 above, by willingly becoming a member of the NDIGC Board of Directors, and participating in acts and omissions of the NDIGC Board.

34. Before July 7, 1982, Robert Short, Barry Lake, Omaha National, Commonwealth, First Security Savings Company, and American Savings, knowingly became members of the conspiracy described in paragraphs 30, 31, and 32 above, by participating in the acts and omissions described in paragraph 17 above.

35. About July 7, 1982, the Defendants named in paragraphs 30, 32, 33, and 34 above, enlarged the conspiracy to incorporate additional unlawful purposes. These additional purposes were as follows:

    A. To conceal from the general public the unlawful management and insolvency of an industrial loan and investment company owned by many of the conspirators and their corporate employers;

    B. To mislead the general public to believe that the industrial loan and investment industry in Nebraska continued to be economically sound and well-managed; and

    C. To convert NDIGC money for the use and benefit of the conspirators and their corporate employers.

    In pursuit of the purposes of the conspiracy, the Defendants named in paragraphs 30, 32, 33 and 34 above, undertook the acts, omissions, and representations described in paragraph 17 above.

36. Before December 22, 1982, Beckman knowingly became a member of the conspiracy described in paragraphs 30, 31, 32, 33 and 35 above, by willingly becoming a member of the NDIGC Board and by

participating in acts and omissions of the NDIGC Board. About December 22, 1982, this conspiracy was enlarged to incorporate an additional unlawful purpose. This additional purpose was to use NDIGC deposit guaranty funds contrary to the provisions of the NDIGC Act. In pursuit of the purposes of the conspiracy, Amen, Adams, Applebee, Ashcraft, Beckman, Hake, Roemmich, and Spoeneman undertook the acts, omissions, and representations described in paragraph 18 above.

37. Before April 10, 1983, First National Omaha and O'Neal knowingly became members of the conspiracy described in paragraphs 30, 31, 32, 34, 35 and 36 above, by participating in the acts and omissions described in paragraph 19 above. About April 10, 1983, this conspiracy was enlarged to incorporate additional unlawful purposes. These additional purposes were as follows:

A. To convert NDIGC funds for the use and benefit of an institution not a member of NDIGC, and for the use and benefit of individual persons;

B. To conceal felonious acts of S.E. Copple, Newton Copple, and James Gillette; and

C. To conceal Amen's misfeasance and nonfeasance in office.

In pursuit of the purposes of the conspiracy Amen, Moylan, Adams, Applebee, Ashcraft, Beckman, Hake, Roemmich, Spoeneman, Lake, O'Neal, and First National Omaha undertook the acts, omissions, and representations described in paragraph 19 above.

38. Before November 1, 1983, Heumann knowingly became a member of the conspiracy described in paragraphs 30, 31, 32, 34, 35, 36, and 37 above, by

willingly becoming a member of the NDIGC Board and by participating in acts and omissions of the NDIGC Board. Heumann thereafter continued with other NDIGC directors to maintain the previously made misrepresentations described in paragraphs 12, 14, and 16 above.

39. As a proximate consequence of the acts, omissions, and representations described in paragraphs 12 through 19 and 30 through 38 above, Plaintiffs suffered damage in the manner described in paragraphs 20 and 21 above.

IV. FOURTH CAUSE OF ACTION: BREACH OF FAITH

40. Plaintiffs incorporate in this Fourth Cause of Action the allegations of paragraphs 1 through 21, and 30 through 38 above.

41. Amen, Moylan, and the NDIGC directors established and controlled the policies, acts, and omissions of NDIGC from January 6, 1979 through November 1, 1983.

42. From August 8, 1979 until after November 1, 1983, NDIGC was a surety as to accounts of Commonwealth depositors and an insurer of the integrity of Commonwealth management and the solvency of Commonwealth.

43. On August 8, 1979, NDIGC entered into the following contract with Commonwealth:

A. NDIGC offered to guaranty Commonwealth deposits by allowing Commonwealth to become a NDIGC member;

B. Commonwealth accepted NDIGC's offer, by becoming an NDIGC member;

C. From August 8, 1979 until after November 1, 1983, Commonwealth paid to NDIGC all amounts required by NDIGC as consideration for membership in NDIGC and for NDIGC deposit guaranties of Commonwealth depositor accounts.

44. With respect to the contract described in paragraph 43 above, Commonwealth and NDIGC were in an inherently unequal bargaining position in that the terms of the contract were set by NDIGC and were not subject to negotiation. Commonwealth was motivated to accept the terms of the contract set by NDIGC to provide security for its solvency and to provide future protection to Commonwealth depositors.

45. With respect to the contract described in paragraph 43 above, depositors of Commonwealth were third-party beneficiaries who are entitled to enforce the terms of the contract. Weimer and ACC assignors were especially vulnerable to harm flowing from non-performance of the contract and of necessity placed trust in NDIGC to perform the contract. NDIGC was bound to know that Weimer and ACC assignors were especially vulnerable to harm from non-performance of the contract.

46. Commonwealth was induced to enter into the contract described in paragraph 43 above, by the fraudulent misrepresentations and concealment of material facts, by Amen, Moylan, and the NDIGC directors in the manner described in paragraphs 12 through 19, and 30 through 38 above. Weimer and ACC assignors were induced to become and remain third party beneficiaries of this contract by these same fraudulent misrepresentations and concealment of material facts.

47. Amen, Moylan, and the NDIGC directors in dealing with Commonwealth for the benefit of Commonwealth depositors had the following duties:

    A. To cause NDIGC to perform the contract in good faith;

    B. To avoid self-dealing for their own benefit with NDIGC funds and contracts; and

    C. To avoid using NDIGC funds and contracts for the benefit of their corporate employers other than NDIGC.

48. The acts, omissions, and representations of Amen and NDIGC directors described in paragraphs 12 through 19 and 30 through 38 above, were in breach of their duties described in paragraph 47 above. As a proximate consequence of these breaches of duties, Plaintiffs were damaged in the manner described in paragraphs 20 and 21 above.

V. FIFTH CAUSE OF ACTION: BREACH OF FIDUCIARY DUTIES

49. The Plaintiffs incorporate in this Fifth Cause of Action the allegations of paragraphs 1 through 21 and 30 through 38 above.

50. In accordance with Section 21-17,135, R.R.S. Neb. 1943, the NDIGC Directors were given custody and control of payments by NDIGC member institutions to the NDIGC deposit guaranty fund. These payments were made to NDIGC for the benefit of depositors in member institutions, including Weimer and ACC assignors. The NDIGC Directors were therefore trustees of the NDIGC deposit guaranty fund, for the benefit of NDIGC member institution depositors.

51. The acts, omissions, and representations described in paragraphs 12 through 19 above, were in breach of the fiduciary duties of the Defendant NDIGC Directors as trustees of the NDIGC deposit guaranty fund.

52. Amen, Moylan, Lake, Short, O'Neal, Omaha National, and First National Omaha are liable to the Plaintiffs as principals, in the same manner as the Defendant NDIGC Directors/Trustees. This is because Amen, Moylan, Lake, Short, O'Neal, Omaha National, and First National Omaha instigated, promoted, encouraged, countenanced, and abetted the acts, omissions, and representations described in paragraphs 12 through 19 above.

53. As a proximate consequence of the acts, omissions, and representations described in paragraphs 12 through 19 above, Weimer and the ACC assignors were damaged in the manner described in paragraphs 20 and 21 above.

VI. SIXTH CAUSE OF ACTION: BREACH OF STATUTORY DUTIES AND THE DUTY OF FAITHFUL PERFORMANCE

54. The Plaintiffs incorporate in this Sixth Cause of Action the allegations of paragraphs 1 through 21 above.

55. Amen and Lake, as employees of the State of Nebraska, had positive duties to Weimer and ACC assignors as follows:

A. Under Sections 8-102 and 8-401.01, R.R.S. Neb. 1943, to supervise, control, and regulate Nebraska industrial loan and investment companies (industrials);

B. Under Section 8-401.02, R.R.S. Neb. 1943, to examine Nebraska industrials, to examine witnesses under oath, and to investigate and uncover violations of law by industrial officers;

C. Under Section 8-403.04, R.R.S. Neb. 1943, to revoke the licenses of executive officers of industrials, for mismanagement, self-dealing, and law violations;

D. Under Section 8-403.05, R.R.S. Neb. 1943, to require industrials and credit unions to provide surety bonds. The surety bonds were to indemnify each credit union and industrial against all loss of money caused by dishonest acts of officers or employees;

E. Under Section 8-408.02, R.R.S. Neb. 1943, to obtain complete knowledge of the condition of each industrial;

F. Under Section 8-416, R.R.S. Neb. 1943, to take over the property and business of insolvent industrials and to order liquidation of insolvent industrials.

56. Amen and Lake breached the duties described in paragraph 55 above, willfully, wantonly, and recklessly, as follows:

A. They failed and refused to supervise, control, and regulate Commonwealth, Dwight Co-Op, American Savings, The Industrial Company, and First Security Savings in the manner required by Nebraska statutes;

B. They failed and refused to investigate and uncover in a timely and diligent manner violations of law by officers of Commonwealth, The Industrial Company, American

Savings, and First Security Savings in the manner required by Nebraska statutes;

C. They failed to revoke the licenses of officers of Commonwealth. The Industrial Company, Dwight Co-Op, American Savings, and First Security Savings in a timely and diligent manner;

D. They failed to require surety bonds indemnifying against all losses incurred by Commonwealth, The Industrial Company, Dwight Co-Op, American Savings, and First Security Savings due to dishonesty of their officers and employees;

E. They failed and refused to obtain complete knowledge of the condition of Commonwealth, The Industrial Company, American Savings, and First Security Savings in a timely and diligent manner;

F. They failed and refused to declare the insolvency of Commonwealth, The Industrial Company, American Savings, and First Security Savings, and to take control of the business and property of these institutions.

57. In the manner described in paragraphs 12 through 19 and 30 through 38 above, Moylan, the Defendant NDIGC Directors and Short, O'Neal, Omaha National, and First National Omaha instigated, promoted, encouraged, countenanced, and abetted the breaches of duty described in paragraphs 55 and 56 above.

58. Under Section 8-102, R.R.S. Neb. 1943, Nebraska industrials are quasi-public in nature. The defendant State employees, NDIGC Directors, and officers of Nebraska industrials therefore had a duty to perform diligently and faithfully the responsibilities of

their respective offices. The acts, omissions, and representations described in paragraphs 12 through 19, and 30 through 38, 55 and 56 above, were breaches of this duty.

59. The Defendant NDIGC Directors and Moylan had positive duties to Weimer and ACC assignors as follows:

A. Under Section 21-17,139(1), R.R.S. Neb. 1943, to notify the Department of Banking and Finance of any information they had indicating the insolvent or unsound financial condition of member institutions;

B. Under Section 21-17,139(2), R.R.S. Neb. 1943, to examine or cause the examination of member institutions in an unsound financial condition;

C. Under Section 21-17,134(8), R.R.S. Neb. 1943, to ask the Department of Banking and Finance or a Court to take control of the affairs and property of member institutions in unsound financial condition;

D. Under Sections 21-17,128(1) and 21-17,144, R.R.S. Neb. 1943, to establish amounts of deposit guaranties fairly reflecting the ability of NDIGC to make good on the guaranties;

E. Under Section 21-17,135(3), R.R.S. Neb. 1943, to secure and hold membership and growth fees from member institutions as a fund for the payment of deposit guaranties;

F. Under Section 21-17,134, R.R.S. Neb. 1943, to consider the economic advisability of guaranteeing accounts of membership

applicants, without undue risk to NDIGC and to member institution depositors;

G. Under Section 21-17,135(4), R.R.S. Neb. 1943, to facilitate special assessments of member institutions for the benefit of member institution depositors.

60. The Defendant NDIGC Directors and Moylan breached the duties described in paragraph 59 above, willfully, wantonly, and recklessly, as follows:

A. They failed and refused to notify the Department of Banking and Finance of information they had indicating the unsound financial condition of member institutions Commonwealth, American Savings, and Dwight Co-Op;

B. They failed and refused to examine or cause to be examined member institutions Commonwealth, American Savings, and First Security Savings;

C. They failed and refused to ask the Department of Banking and Finance or a court to direct the takeover of the property and affairs of Commonwealth, American Savings, and First Security Savings;

D. They established and maintained NDIGC deposit guaranties in amounts which misrepresented the ability of NDIGC to make good on the guaranties as described in paragraphs 12, 16, 30, and 32 above;

E. They invaded and diminished the NDIGC deposit guaranty fund for purposes not authorized by law, in the manner described

in paragraphs 17, 18, 19, 33, 36, and 37 above;

F. They failed and refused to consider the economic advisability of admitting to membership Commonwealth and American Savings as described in paragraphs 14 through 31 above;

G. They failed and refused to present to NDIGC members the fact of impairment of NDIGC capital assets and to facilitate special assessments to secure NDIGC capital assets.

61. In the manner described in paragraphs 12 through 19 and 30 through 38 above, Amen, Lake, Short, O'Neal, Omaha National, and First National Omaha instigated, promoted, encouraged, countenanced, and abetted the breaches of duty described in paragraphs 59 and 60 above.

62. As a proximate consequence of the breaches of duty described in this sixth cause of action, the Plaintiffs were damaged in the manner described in paragraphs 20 and 21 above.

VII. SEVENTH CAUSE OF ACTION: DEPRIVATION OF CIVIL RIGHTS

63. The Plaintiffs incorporate in this Seventh Cause of Action the allegations of paragraphs 1 through 38 above.

64. The Defendants are persons or companies as defined in Section 49-801, R.R.S. Neb. 1943.

65. By the acts, omissions, and representations described in paragraphs 1 through 39 above, the

Defendants subjected Commonwealth creditors to the deprivation of rights and privileges as follows:

A. The right to honest, effective, faithful performance by Amen and Lake of their duties as officers and employees of the State of Nebraska;

B. The right to honest, effective, and faithful administration of the NDIGC by its directors and Moylan in accordance with the NDIGC Act;

C. The right not to have their property taken or damaged for public use without just compensation;

D. The right not to have their property taken or damaged without due process of law;

E. The right to equal protection of the law of the State of Nebraska.

66. The rights and privileges described in paragraph 65 above, are secured to Commonwealth creditors by the Fifth and Fourteenth Amendments to the Constitution of the United States of America; by Sections 1, 3, 6, 13, 21, and 25 of Article I of the Constitution of the State of Nebraska; and by the provisions of Sections 25-101 and 25-103, R.R.S. Neb. 1943.

67. By reason of the deprivations of rights and privileges described in paragraphs 65 and 66 above, the Defendants are liable to Commonwealth creditors including Weimer and the ACC assignors in accordance with the provisions of Section 20-148, R.R.S. Neb. 1943.

PRAYER FOR RELIEF

The Plaintiffs request judgment against the Defendants jointly and severally as follows:

A. On each of the First, Second, Third, Fourth, Fifth, Sixth and Seventh Causes of Action for actual, special, and consequential damages of $58,000,000.00; for costs of this action; for interest from the date of judgment; and for reasonable attorneys' fees;

B. On all causes of action, for judgment declaring the Defendants to be trustees for the benefit of the plaintiffs with respect to all money or other property, including accumulations of money or other property, received by the Defendants as a consequence of unlawful acts, omissions, and representations described in the Petition.

C. On all causes of action, for judgment requiring the Defendants to account to the Plaintiffs for the money and property described in paragraph B immediately above.

CLAUDE T. WEIMER and
ASSOCIATION OF COMMONWEALTH CLAIMANTS,

Plaintiffs.

BY: Robert R. Gibson
ROBERT R. GIBSON, Bar No. 11491
PROFESSIONAL LEGAL ASSOCIATES OF NEBRASKA, p.c.
740 South 17th Street
Lincoln, NE 68508
402-474-1440

CERTIFICATE OF SERVICE

Copies of this Amended Petition were mailed to attorneys on the attached list, on February 19, 1988.

/s/ Robert R. Gibson.
Robert R. Gibson

EXHIBIT A

THE DEFENDANTS:

Paul Amen
Kenneth A. Wellman
William C. Beckman
Douglas G. Alford
Alfred H. Adams
Kenlon H. Hake
Roy L. Ashcraft
Darrell D. Anderson
Timothy R. Spoeneman
Denis K. Applebee
Herbert R. Heumann
Allan C. Roemmick
Dennis O'Neal
Robert Short
Barry Lake
James Moylan

Commerce Savings Columbus, Inc.
Commerce Savings Lincoln, Inc.
Commerce Savings Scottsbluff, Inc.
Commerce Group, Inc.
First National Bank of Grand Island, Inc.
Provident Federal Savings Bank, Inc.
Union Bank & Trust Co., Inc.
American Security Bank, Inc.
Omaha National Bank & Trust Co., Inc.
First National Bank of Omaha, Inc.

Exhibit 1990-B

OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

Claude T. Weimer and Association of Commonwealth Claimants, an unincorporated association, Appellants and Cross-Appellees,
v.
Paul Amen et al., Appellees, Commerce Group, Inc., et al., Appellees and Cross-Appellants.

Case Caption

Weimer v. Amen

Filed May 11, 1990. Nos. 88-430, 88-652.

Appeal from the District Court for Lancaster County: Robert R. Camp, Judge. Affirmed in part, and in part reversed and remanded with directions.

Robert R. Gibson, of Professional Legal Associates of Nebraska, P.C., for appellants.

Robert M. Spire, Attorney General, and Charles E. Lowe for appellees Amen and Lake.

Gary L. Dolan, Trev. E. Peterson, and Shirley K. Poland-Williams, of Knudsen, Berkheimer, Richardson & Endacot; James B. Cavanagh, of Erickson & Sederstrom, P.C.; John M. Guthery and Gregory H. Perry, of Perry, Guthery, Haase, & Gessford, P.C.; Baird, Holm, McEachen, Pedersen, Hamann & Strasheim; Cline, Williams, Wright, Johnson & Oldfather; Faegre & Benson; and Crosby, Guenzel, Davis, Kessner & Kuester for appellees Commerce Group et al.

1. Statutes: Appeal and Error. Statutory interpretation is a matter of law in connection with which this court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.

2. Statutes: Presumptions: Legislature: Intent: Appeal and Error. The general rules governing statutory construction and interpretation provide that in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; this court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. Furthermore, it is not within the province of this court to read a meaning into a statute which is not warranted by the legislative language; neither is it within the province of this court to read anything plain, direct, and unambiguous out of the statute. In construing a statute it is presumed that the Legislature intended a sensible, rather than an absurd, result.

3. Banks and Banking: Receivers: Debtors and Creditors. Neb. Rev. Stat. § 8-199 (Reissue 1983) grants the receiver broad authority to enforce all debts or other obligations of whatever kind of nature due to the creditors of the failed institution which arise by virtue of the institution's insolvency.

4. Banks and Banking: Receivers: Claims. In the absence of an allegation of an individual harm upon which a claimant can directly bring suit, claims are derivative and are properly pursued by the receiver under Neb. Rev. Stat. § 8-199 (Reissue 1983).

5. Constitutional Law: Statutes. No vested rights are impaired by a statutory or constitutional provision which creates a remedy for an existing right.

6. Constitutional Law: Due Process: Banks and Banking: Receivers. Neb. Rev. Stat. § 8-199 (Reissue 1983) does not unconstitutionally deny access to the courts, violate due process, nor take property for a public purpose without just compensation.

7. Summary Judgment. Summary judgment is proper when the pleadings, depositions, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from the material facts, and the moving party is entitled to judgment as a matter of law.

8. Summary Judgment: Appeal and Error. In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

9. Demurrer: Pleadings: Appeal and Error. In reviewing an order sustaining a demurrer, this court accepts the truth of facts well pled and the factual and legal inferences which may be deduced from such facts, but does not accept conclusions of the pleader.

10. Demurrer: Pleadings. In ruling on a demurrer, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled.

11. Actions: Banks and Banking: Receivers. A depositor may bring a derivative action to recover for wrongs

against the bank or financial institution, which wrongs have indirectly injured depositors, but only after having made an unsuccessful demand on the bank or its receiver to bring suit.

12. Courts: Judgments: Appeal and Error. Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the Supreme Court will affirm.

Boslaugh, White, Shanahan, Grant, and Fahrnbruch, JJ., and Ronin and Colwell, D. JJ., Retired.

PER CURIAM.

Claude T. Weimer, for himself, and the Association of commonwealth Claimants, an unincorporated association, as assignees of various depositors of the Commonwealth Savings Company, brought an action against the defendants, alleging numerous improprieties in the management and supervision of the Commonwealth Savings Company, resulting in its subsequent insolvency, collapse, and liquidation. The defendants are Paul Amen, former director of the Department of Banking and Finance of the State of Nebraska; Barry Lake, former Department of Banking and Finance general counsel; various financial institutions, including members of the Nebraska Depository Institution Guaranty Corporation (NDIGC); and certain employees of the financial institutions, including the directors of the NDIGC.

Amen and Lake filed a motion for summary judgment, alleging that the causes of action against them were released by the settlement of a tort claim by the receiver

of the Commonwealth Savings Company, said settlement being approved by order of the district court for Lancaster County, funded by the Legislature, and paid by the State Treasurer to the receiver. The district court sustained the motion and dismissed the petition as to Amen and Lake.

The remaining defendants filed demurrers to the amended petition, claiming, among other things, that plaintiffs were not the real party in interest and therefore lacked standing to bring suit. The district court sustained the demurrers on this basis and dismissed the petition, as it contained an incurable defect.

The plaintiffs appealed from the order granting summary judgment (case No. 88-430) and from the judgment sustaining the defendants' demurrers and dismissing the plaintiffs' petition (case No. 88-652). As both appeals are from a single district court case and present essentially the same issues, we will consider and dispose of both appeals in a single opinion.

A review of the receivership proceedings in the matter of the insolvency of Commonwealth Savings Company is set forth here in order to explain how the case at bar arrived at the present juncture.

The Commonwealth Savings Company (hereafter Commonwealth) was an industrial loan and investment company in Lincoln, Nebraska. On November 1, 1983, the Department of Banking and Finance (hereafter the department) took possession of Commonwealth pursuant to Neb. Rev. Stat. §§ 8-416 (Reissue 1987) and 8-187 (Reissue 1983). On November 8, 1983, the district court for

Lancaster County issued an order declaring Commonwealth insolvent and appointed the department as the receiver and liquidating agent of Commonwealth according to § 8-416 and Neb. Rev. Stat. § 8-198 (Reissue 1983).

The receiver proceeded to file with the State Claims Board two tort claims against the State of Nebraska pursuant to the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et. seq. (Reissues 1981 & 1987 & Supp. 1983). The first claim was filed on December 23, 1983, on behalf of the creditors of Commonwealth against the State, its officers, and employees for $56 million. The creditors alleged that negligent, willful, wanton, and fraudulent acts of the officers and employees caused the creditors' losses.

The second claim, filed on January 10, 1984, for $56,433,959.29, was brought on behalf of "a special class of creditors – those certificate of indebtedness holders who have a unique and special claim under the Nebraska Depository Institution Guaranty Corporation Act, Sections 21-17,127 through 21-17,145 R.R.S. Nebr. 1943 (Reissue 1977)." This claim essentially stated the same allegations against the same persons as in the first claim, and made further allegations attacking the constitutionality of Neb. Rev. Stat. § 21-17,141 (Reissue 1987).

The State Claims Board heard these claims on February 13, 1984, and on February 29 adopted a "decision" as to the claims. The decision enunciated that "the Board has decided that there is a strong possibility of some liability on the part of the State of Nebraska arising out of certain actions of the Banking Department with regard to

the Nebraska Depository Institution Guaranty Corporation Act." Based on its deliberations, the board decided that, pursuant to its statutory authority in § 81-8,211 (Reissue 1987), the State should compromise and settle the claims.

It is also provided in § 81-8,211 that any claim settled in an amount of more than $5,000 shall be submitted for approval by the district court for Lancaster County. The claims were thus submitted, and on March 2, 1984, a journal entry was filed by the district court's presiding judge ordering that a three-judge panel decide the matter due to the complexity of the legal issues presented, the public interest in the matter, and the need for a prompt decision by the court. On March 5, one of the judges was excused from service in the case, and the matter proceeded before a two-judge panel.

A hearing was held on March 12, where evidence was adduced and briefs were submitted to the court on the matter of approval of the State Claims Board's proposal of settlement.

On March 16, the district court denied the petition and application seeking approval of the State Claims Board's "decision" of February 29. In its 30-page order, the court determined that it was required to exercise its discretion and was not merely a "rubber stamp" with respect to action of the board, basing this determination on case law and the following portion of § 81-8,211; "The court may deny the application for any legal and sufficient reason, or may direct the State Claims Board to conduct further hearings on any material issues."

The Court found that the decision of the State Claims Board

> (1) Is not a compromise, settlement or allowance of a claim and therefore such action is in excess of the Board's authority.
>
> (2) Is unsupported by competent, material and substantial evidence in view of the entire record.
>
> (3) Is based on conclusion of law which are clearly erroneous and unsupported by any evidence in the record to the contrary.
>
> (4) Is arbitrary and capricious.

The court clearly went to great lengths in striving to discharge its duty of making a *legal* determination of whether the board's decision should be approved, as seen in part of the dicta in the court's order:

> Were it within our power to base our approval on moral grounds or on concepts of fundamental fairness, we would not hesitate to do so. However, our decision, as the structure of society as a whole, must rest upon the rule of law. . . . Almost all applicable law is clearly contrary to the position taken by the Receiver. The statutes are clear.
>
> . . . Frankly, we do not and cannot expect the majority of these people [who suffered grievous losses] to understand or appreciate the decision we must make which may appear to be based on legal technicalities. However, we are not free to depart from the law as clearly set forth in applicable statutes and judicial decisions.

Upon the receiver's motion, the matter was remanded to the State Claims Board. On April 2, the receiver filed a miscellaneous (contract) claim with the board. The contract claim essentially alleged that the NDIGC was an agency or instrumentality of the State, and therefore the State should be obligated to pay up to $30,000 on each of the guaranteed accounts at Commonwealth.

On June 12, 1984, the State Claims Board filed an amended petition and application in the district court for Lancaster County. The amended petition stated that on May 25, 1984, the State Claims Board held a further hearing pursuant to duly publicized notice with regard to the receiver's tort and contract claims. The amended petition further stated that the State Claims Board unanimously adopted both a decision and an "Agreement for Compromise of Tort Claim" at a duly publicized open meeting on May 31. This second decision by the board declared that, after considering both claims but without deciding the contract claim, a compromise settlement should be executed in the amount of $33 million. The amended petition and application therefore sought approval of the settlement in the district court, as required by § 81-8,211.

After a hearing on the matter on July 10, 1984, the district court issued a 46-page order on July 27 which denied approval of the board's "decision" of May 31 for the following reasons:

> a. Our conclusions as to the law applicable to this matter are substantially the same as expressed in our prior Order. The law, particularly in light of the decision in *Varig Airlines*

[467 U.S. 797, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984)], is not supportive of the Receiver's position. Therefore, the Receiver's probabilities of success should the claim be litigated are not encouraging.

b. There has been an inadequate showing as to the amount of damages which reasonably may be incurred, particularly in regard to the valuation of the remaining assets of Commonwealth.

c. This proposed settlement, like the prior decision, virtually provides for reimbursement of one hundred percent of the possible loss when the liquidating value of the assets is included. Based on the likelihood of success should the claim be litigated, the Decision of the Board clearly is excessive and is not a fair and reasonable settlement when confronted with the minimal likelihood of liability.

d. The Decision of the Board is based on conclusions of law which are clearly erroneous.

Pursuant to stipulation of the parties filed on October 30, the district court remanded the matter to the State Claims Board for the sole purpose of allowing the receiver to withdraw the claim, pursuant to § 81-8,213 (Reissue 1987), and to file suit on the claim.

The record further shows that the receiver proceeded to file suit against the State of Nebraska on March 20, 1985, in the district court for Lancaster County. The receiver alleged numerous (33) acts of wrongful and negligent conduct by the department in failing to supervise, regulate, and examine Commonwealth, including wrongful and negligent conduct of the department's director in

admitting Commonwealth as a member of the NDIGC. The State's answer generally denied all allegations in the receiver's petition.

On March 29 the parties to the action filed an application for approval of settlement pursuant to § 81-8,218 (Reissue 1987), requesting the court's approval of a compromise settlement of all claims of the plaintiff, holders of all certificates of indebtedness of plaintiff, and all other creditors of plaintiff. Conditions of the settlement included the payment to the receiver of the sum of $8.5 million as a full and complete compromise settlement of any and all claims of the receiver (on behalf of itself and its representatives) against the State, the department, and their past, present, and future officials and employees. A release of all claims by the receiver to be executed upon payment of the $8.5 million accompanied the application.

As the settlement affected the initial district court receivership proceedings wherein Commonwealth was first declared insolvent, the receiver also filed therein, on April 1, 1985, an application requesting that the district court set a hearing date for the application for authority to settle in the receiver's suit against the State and to authorize notice of the hearing to Commonwealth creditors by sending a notice to each creditor by mail, and by publication in a newspaper of general circulation for three consecutive weeks prior to the hearing.

The district court entered orders dated April 1 in each of the aforementioned cases, setting the hearing for April 22 and approving the form and method of notice to the creditors. On April 15, the presiding judge of the

district court for Lancaster County appointed a two-judge panel to consider the matter.

After the hearing, the court entered an order on April 26 that the application for approval of settlement be approved and forwarded to the Legislature for review and the appropriation of funds. In its order, the court found that proper notice had been given to the creditors pursuant to law and the order of the court. The court noted that the substantial majority of creditors who expressed an opinion at or before the hearing were either opposed to the proposed settlement or had reservations concerning the terms of the release or the future actions of the Legislature. The court stated, however, that it could not modify the proposed amount of the settlement or any of its provisions. The court had only the authority to approve or disapprove.

The court said that in reviewing the proposed settlement it adhered to its statement in the prior orders denying the State Claims Board's proposed settlement: " 'Therefore, this court, in exercising its discretion herein must reach a conclusion as to the likelihood of liability on the part of the State, the amount of damages resulting from such liability and whether any proposed settlement is fair, adequate and reasonable to both the claimants and the State.' "

Thus reviewing the matter, the court concluded that the proposed settlement was fair, adequate, and reasonable to both the claimants and the State, and could find no legal or other reason to disapprove it. The court also entered an abbreviated order approving the settlement in the initial Commonwealth matter of insolvency.

The record shows that a state treasury warrant was issued to the receiver in the amount of $8,518,228.09 and that the release was signed on September 26, 1985, by the receiver.

INTERPRETATION OF § 8-199

Appellants assign error to the district court in its interpretation of Neb. Rev. Stat. § 8-199 (Reissue 1983). Statutory interpretation is a matter of law in connection with which this court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Sorensen v. City of Omaha*, 230 Neb. 286, 430 N.W.2d 696 (1988). The general rules governing statutory construction and interpretation provide that in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; this court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. Furthermore, it is not within the province of this court to read a meaning into a statute which is not warranted by the legislative language; neither is it within the province of this court to read anything plain, direct, and unambiguous out of the statute. In construing a statute it is presumed that the Legislature intended a sensible, rather than an absurd, result. *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W. 2d 151 (1989).

We find that the plain, direct, and unambiguous language of § 8-199 allows the receiver to enforce "all debts or other obligations of whatever kind or nature due" to the creditors of the failed institution, including those

asserted by the appellants. This construction is consistent with the rule of a corporate receiver:

> A corporate receiver represents not only the corporation, but all its creditors, and as to the latter it is his duty to secure all the assets available for their payment. For this purpose he succeeds to their rights, and has all the powers to enforce such rights that the creditors before his appointment had in their own behalf, even though such powers be beyond those which he has as the representative of the corporation alone.

66 Am. Jur. 2d *Receivers* § 450 (1973).

Appellants contend that they alone can enforce their alleged causes of action, and cite as a proposition of law that the receiver of an insolvent institution may not take possession of property that did not belong to the insolvent institution. Appellants cite *Frederick V. McRae,* 157 Minn. 366, 196 N.W. 270 (1923), in support of this proposition. That case holds that a depositor can have an individual right of action in deceit which could not be brought by the receiver if the bank officers fraudulently accepted deposits while knowing the bank was insolvent. Nebraska law has long recognized that a depositor may have an individual action under this scenario. See, *Higgins v. Hayden,* 53 Neb. 61, 73 N.W. 280 (1897); *Wilson v. Coburn,* 35 Neb. 530, 53 N.W. 466 (1892). However, appellants do not sufficiently state such a cause of action.

We believe that appellants' alleged actions are properly characterized in *In re Sunrise Securities Litigation,* 108 Bankr. 471, 476 (E.D. Pa. 1989):

> In general, "wrongs committed by a bank's officers or directors that injure all depositors and creditors alike create a liability which is an asset of the bank itself and for which only the bank or its receiver may recover." *In re Longhorn Securities Litigation,* (*573 F.Supp. 255*) 272 (W.D. Okla.1983), *citing Adato v. Kagan,* (*559 F.2d 1111*) 1117) (2d Cir.1979). Under such circumstances, "[t]he damage to depositors is indirect only and it is generally recognized that for such matters a depositor has no direct and individual right of action against a director." *Michelsen v. Penney,* (*20 F.Supp. 537, 539*) (S.D.N.Y.1934) *See* 11 Michie, *Banks and Banking,* Ch. 3, § 69, at 479 (1986) ("where the amount for which the officers and directors may be liable results from matters affecting all creditors, they constitute assets of the corporation for the benefit of all depositors and creditors, and suit therefor must be brought by the bank or its receiver"). . . .

In re Sunrise Securities Litigation further holds that when a depositor claims to have been defrauded by a misrepresentation or omission in a statement directed to the general public, he or she does not allege a wrong that is distinctly the depositor's and not common to other depositors or creditors, and therefore claims an indirect injury.

Appellants' petition alleges that misrepresentations were made to the general public, not to a single depositor or specific group of depositors. Further, appellants allege that the appellees' willful and negligent actions harmed all depositors and, in at least one instance, harmed Commonwealth *creditors*. The petition is not even clear

whether the Association of Commonwealth Claimants represents all Commonwealth depositors.

Other cases cited by appellants, including *State ex rel. Sorensen, v. Nebraska State Bank*, 124 Neb. 449, 247 N.W. 31 (1933), *Brownell v. Adams*, 121 Neb. 304, 236 N.W. 750 (1931), and *Rogers v. Selleck*, 117 Neb. 569, 221 N.W. 702 (1928), affirm the acts of the respective receivers in enforcing causes of action on behalf of creditors and are not supportive of appellants' contention that they distinctly own their alleged causes of action.

We therefore find that the appellants have not alleged an individual harm, but that their claims are derivative and clearly are properly pursued by the receiver under § 8-199.

The appellants also challenge the constitutionality of § 8-199, alleging that it denies access to the courts, deprives appellants of due process, and takes property of citizens for a public purpose without just compensation. In *Department of Banking v. Hedges*, 136 Neb. 382, 286 N.W. 277 (1939), this court upheld the constitutionality of a receivership procedure under predecessor statutes which allowed the Department of Banking and its superintendent to bring actions on behalf of creditors. Therein we stated:

> In 9 C.J.S. 170, sec. 88, it is said:
>
> "However, unless the Constitution specifically prescribes and limits the persons by whom such actions may be brought, it is within the power of the legislature to authorize particular persons to sue, and statutes conferring such authority have been sustained. Further, since

> such legislation is procedural, and since methods of procedure which do not affect the substantial rights of the parties are within the control of the legislature where no new right is created nor any penalty imposed, a statutory change as to the person who may enforce the liability may apply to stockholders who became such before its enactment as well as to those who became such thereafter. . . . "
>
> . . . .
>
> In *Luikart v. Bunz*, [125 Neb. 867, 252 N.W. 473 (1934)], the effect of the decision is: " . . . No vested rights are impaired by statutory or constitutional provision which creates a remedy for an existing right."

Hedges, supra at 393-94, 286 N.W. at 284.

We have also more recently held that, in record to obtaining a remedy through the courts, article 1, § 13, of the Nebraska Constitution is not violated when one party brings an action on another's behalf. See, e.g., *Pullen v. Novak*, 169 Neb. 211, 99 N.W.2d 16 (1959) (guardian or next friend may sue on behalf of infants to recover damages done to their person or property by tortious acts of another). Likewise, we hold that § 8-199 merely imposes a procedural remedy which does not affect the substantial rights of the parties, and therefore does not unconstitutionally deny appellants access to the courts.

Regarding the due process challenge, both appellants and appellees cite *Rein v. Johnson*, 149 Neb. 67, 30 N.W.2d 548 (1947), *cert. denied* 335 U.S. 814, 69 S. Ct. 31, 93 L.Ed. 369 (1948). That case sets forth the following on due process:

> The primary purpose of that constitutional guaranty is security of the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice. 12 Am. Jur., Constitutional Law, § 575, p. 271.
>
> As related to legislation, it is generally held that due process is satisfied if the Legislature had the power to act on the subject matter, if that power was not exercised in an arbitrary, capricious, or unreasonably discriminatory manner, and if the act, being definite, had a reasonable relationship to a proper legislative purpose. In other words, if an act of the legislature is authorized and promulgated by the inherent and reserved constitutional powers of the state, and is enforced with due regard to and observance of the rules established by our system of jurisprudence for the security of life, liberty, and property, it is not in conflict with due process of law. 16 C.J.S., Constitutional Law, § 569, p. 1156.

Rein, supra at 82, 30 N.W.2d at 557-58.

As our previous discussion shows, the Legislature clearly had the power to enact § 8-199 as a procedural remedy. Further, the statute has a reasonable relationship to the receiver's purpose of wrapping up the business of the insolvent institution and treating all creditors equitably and fairly. The statutory scheme of a receivership seeks to avoid preferences among creditors, to avoid a multiplicity of lawsuits and races to the courthouse, and to give the receiver meaningful authority to pursue claims, negotiate compromise settlements, and execute binding releases. Finally, in granting the receiver broad

authority to enforce claims on behalf of not only the failed institution but of shareholders and *all* creditors in order to accumulate all possible assets, the power of the Legislature was exercised in neither an arbitrary, capricious, nor unreasonably discriminatory manner. We therefore find that § 8-199 satisfies due process requirements.

Lastly, we find no merit in appellants' argument that § 8-199 allows an unconstitutional taking. We have determined that § 8-199 allows the receiver to enforce the appellants' causes of action. Simply stated, appellants' "property" is not being taken without compensation, but, rather, the enforcement of those rights is given to the receiver (pursuant to the Legislature's power to do so) in order to secure compensation for all creditors in an equitable and nonpreferential manner.

We therefore find no merit in appellants' constitutional challenges to § 8-199.

DEFENDANTS AMEN AND LAKE

There is no dispute that Amen and Lake, as department employees, were properly made defendants in the receiver's suit against the State and in the case at bar. The receiver's petition in its action against the State makes 33 separate allegations of "*wrongful* and negligent conduct of the Department, its Director and its employees," which necessarily encompass the appellants' causes of action against Amen and Lake. The appellants merely contend that they, and not the receiver, are the proper parties to bring their causes of action. Such contention, as we have stated, is without merit.

Appellants also assign error to the district court in accepting a release signed by the receiver as a bar to this action. The receiver's ability to settle or compromise any doubtful debts is enumerated in § 8-199 and Neb. Rev. Stat. §§ 8-1,103 and 8-1,104 (Reissue 1983). The receiver's ability to settle a doubtful debt has also been upheld by this court. See *State v. German Savings Bank*, 65 Neb. 416, 91 N.W. 414 (1902). After going through the State Claims Board and having a proposed settlement rejected twice, the receiver clearly saw this claim as a doubtful debt and therefore entered into a compromise settlement in its claim against the State. Further, the receiver is empowered, under § 8-199, to "make, execute, and deliver any and all . . . instruments necessary and proper to effectuate . . . the settlement of any obligations. . . . " The same power specifically stating "releases" is also granted in § 8-1,103. SECTION 81-8,223 (reissue 1987) provides that an award in a state tort claim shall constitute a complete release by the claimant of any claim against the State and against the employee of the State whose act or omission gave rise to the claim, by reason of the same subject matter. The receiver was therefore within its statutory authority in executing the release as a necessary and proper instrument to effectuate the settlement.

Summary judgment is proper when the pleadings, depositions, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from the material facts, and the moving party is entitled to judgment as a matter of law. *Peterson v. Don Peterson & Assoc. Ins. Agency*, 234 Neb. 651, 452 N.W.2d 517 (1990);

John v. OO (Infinity) S. Development Co., 234 Neb. 190, 450 N.W.2d 199 (1990). In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Peterson, supra; John, supra.*

Viewing the evidence in a light most favorable to appellants, our conclusion remains that the receiver acted at all times within its statutory authority and that Amen and Lake, by virtue of the release, were entitled to summary judgment as a matter of law.

REMAINING DEFENDANTS

The district court sustained the remaining defendants' demurrers on the basis that the plaintiffs were not the real party in interest and therefore lacked the capacity to bring suit. See Neb. Rev. Stat. § 25-806 (Reissue 1989).

In reviewing an order sustaining a demurrer, this court accepts the truth of facts well pled and the factual and legal inferences which reasonably may be deduced from such facts, but does not accept conclusions of the pleader. *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 234 Neb. 789, ___ N.W.2d ___ (1990); *Meyerson v. Coopers & Lybrand*, 233 Neb. 758, 448 N.W.2d 129 (1989); *S.I.D. No. 272 v. Marquardt*, 233 Neb. 39, 443 N.W.2d 877 (1989). In ruling on a demurrer, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled. *Meyerson, supra; S.I.D. No. 272, supra.*

We have determined that appellants' actions are derivative and that they have not suffered individual harm upon which they can sue directly. Their actions are properly brought by the receiver. However, the record shows that the receiver sued only the State of Nebraska, the department, and its employees. If the appellants in fact state a cause of action against the NDIGC or other defendants, this leaves Commonwealth, its creditors, and its depositors with a claim which the receiver failed or neglected to pursue.

The liability of the NDIGC and the State toward the depositors was alleged in the second claim brought before the State Claims Board by the receiver. This raises the question of whether the NDIGC is an agency of the State; for if it is, it would be free of liability by virtue of the release executed by the receiver. The State Tort Claims Act, § 81-8,210(1) (Reissue 1987), says that for the purposes of the act: "State agency shall include all departments, agencies, boards, bureaus, and commissions of the State of Nebraska, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the State of Nebraska, but shall not include corporations that are essentially private corporations."

The Nebraska Depository Institution Guaranty Corporation Act, Neb. Rev. Stat §§ 21-17,127 et. seq. (Reissue 1987), lists four purposes of the act in § 21-17,128. One of those purposes involves a duty of the department "[t]o assist in the detection and prevention of depository institution insolvencies or liquidations," while the other purposes relate solely to the objectives and operations of the corporation. In § 21-17,132 the act gives the corporation all powers granted to nonprofit corporations (which are

not state agencies) as provided in Neb. Rev. Stat. ch. 21, art. 19 (Reissue 1987). Sections 21-17,134 and 21-17,136 indicate that the department acts in a supervisory or regulatory role toward the NDIGC, just as it does with all chartered financial institutions – most of which are private corporations. The NDIGC is formed by private financial institutions, and the members of its board of directors must be officers of those institutions. See §§ 21-17,132 and 21-17,133. The corporation is operated neither by state employees nor at the direction of state government.

An examination of the legislative history of the act shows that the corporation was not intended to be an arm or instrumentality of the State. Testimony on 1976 Neb. Laws, L.B. 948 (the provisions of which would eventually become the NDIGC act), was presented at a hearing before the Banking Committee. James Moylan, a proponent of the bill, stated:

> I think if you want to take the Banking Department and then show the areas that it operates in, it will be banks, industrials, credit unions, savings and loans and right along beside it will be the guaranty corporation. And their relationship to it will be conducted pretty much by this act when you get over to the Banking Act, it's this way with banks; it's this way with credit unions; it's this way with savings and loans; so, it would be another institution that they would have.

Banking Committee Hearing, L.B. 948, 84th Leg., 2d Sess. 25 (Jan. 27, 1976).

Charles Aron of the department stated: "It is our understanding of the concept of this type of a corporation

to basically insure the deposits in the credit unions with this as a complement to the supervision done by the Department of Banking not in lieu of supervision." *Id.* at 29.

> Further, William Riley, director of the department, stated: [T]he Department is not looking to this type of legislation to make our job a [sic] regulation and supervision of both credit union and cooperatives easier for us. . . .
>
> . . . .
>
> . . . Well, I guess the feeling that I don't want to give this committee because I've demonstrated it to the credit unions, is that we are not using this as an arm for better supervision and regulation.

Id. at 31, 33.

Based on our reading of the act and its legislative history (in particular the foregoing statements), we conclude and find that the NDIGC is an "essentially private" corporation and is not an instrumentality or agency of the State of Nebraska. Consequently, appellants have stated a cause of action at least against the NDIGC based on statutory and common-law contractual liability toward Commonwealth and its depositors.

Although the receiver was the proper party to enforce that liability, the appellants are not left without a remedy in this situation. While § 8-199 gives the receiver broad authority to enforce claims on behalf of the bank, its shareholders, and creditors, we find that the shareholders and creditors must be afforded relief when the receiver fails or neglects to enforce a claim. Therefore, in

remaining consistent with general corporate law and the federal common law, we hold that a depositor may bring a derivative action to recover for wrongs against the bank or financial institution, which wrongs have indirectly injured depositors, but only after having made an unsuccessful demand on the bank or its receiver to bring suit. See, *In re Sunrise Securities Litigation*, 108 Bankr. 471 (E.D. Pa. 1989); *Landy v. Federal Deposit Insurance Corporation*, 486 F.2d 139 (3d Cir. 1973); *Michelsen v. Penney*, 10 F. Supp. 537 (S.D.N.Y. 1934).

In order for appellants to state a derivative action, their petition must allege the fact that a demand has been made on the receiver or that such a demand would be futile. The petition makes no such allegation, thereby failing to allege facts sufficient to constitute a cause of action. Consequently, we affirm the action of the trial court in sustaining the demurrers, but for the reason set forth above. See *Grone v. Lincoln Mut. Life Ins. Co.*, 230 Neb. 144, 430 N.W.2d 507 (1988) (where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the Supreme Court will affirm).

The defense of the statute of limitations is raised by way of cross-appeal or otherwise in the briefs of certain appellees. However, as the district court made no ruling on this issue, we decline to express an opinion on the matter at this time and leave to the trial court the propriety of this defense and any others that may arise after the appellants are given an opportunity to amend their petition.

The order in case No. 88-430 granting summary judgment to defendants Amen and Lake is affirmed. In case No. 88-652, we affirm the order of the trial court in sustaining the demurrers, but reverse that part of the trial court's order dismissing the petition and remand this cause with directions to allow the appellants to amend their petition.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

(3)

No. 91-1920

FILED
SEP 4 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

CLAUDE T. WEIMER, For Himself; and
ASSOICIATION OF COMMONWEALTH CLAIMANTS,
An Unincorporated Association,

Petitioners,

vs.

PAUL AMEN; S.E. COPPLE; MARVIN COPPLE; COMMERCE SAVINGS COLUMBUS, INC.; FIRST SAVINGS CO.; FIRST NATIONAL BANK; NORWEST CORP.; COMMERCE GROUP, INC.; COMMERCE SAVINGS LINCOLN, INC.; PROVIDENT FEDERAL SAVINGS BANK; UNION BANK & TRUST CO.; AMERICAN STATE SAVINGS COMPANY; FEDERAL DEPOSIT INSURANCE CORPORATION; AMERICAN SECURITY BANK; COMMERCE SAVINGS SCOTTSBLUFF, INC.; KEN WELLMAN; WILLIAM BECKMAN; DOUGLAS ALFORD; ALFRED ADAMS; KENLON H. HAKE; ROY ASHCRAFT; DARREL ANDERSON; TIM SPOENEMAN; DENIS APPELBEE; and HERBERT HEUMANN,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT IN REPLY TO RESPONDENTS' BRIEF .. 2

CONCLUSION 8

TABLE OF AUTHORITIES

Page

Hamann vs. Marsh, 237 Neb. 699, 467 N.W.2d 836 (1992) 6

Holmes vs. SIPC, 503 U.S. ___, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992)..... *passim*

RULES:

Rule 17(a), Federal Rules of Civil Procedure 6, 8

STATUTES:

18 U.S.C. § 1964(c) 3

INTRODUCTION

The respondents, in their Brief at page 1, characterize the questions presented for review as follows:

> "1. Whether alleged RICO violations in administering a state-chartered deposit insurance corporation *proximately caused losses to creditors of an insured bank which occurred when the bank failed.* (Emphasis supplied)
>
> 2. Whether it was an abuse of discretion to dismiss an amended complaint for failure to state a claim without granting a post-dismissal request for leave to amend."

The Respondents' first Question Presented for Review concerns the issue of proximate cause, which was NOT addressed by the district court or by the court of appeals. Nevertheless, Respondents now assert that the decisions of the district court and the court of appeals to dismiss ACC's complaint should not be disturbed, on the ground that ACC's injuries were not proximately caused by the wrongful acts of the Respondents, as required by this Court's opinion in *Holmes vs. SIPC*, 503 U.S. ___, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992). This argument of the Respondents is misplaced, as discussed in the REPLY, below.

The Respondents' second "Question Presented For Review" quoted above, is not within the scope of the Petition for Writ of Certiorari.

The Petitioner, ASSOCIATION OF COMMONWEALTH CLAIMANTS (ACC), did file a post-dismissal Motion for Relief From Judgment (Petitioner's Appendix M-1). This Motion for Relief From Judgment was denied by the district court on the ground that jurisdiction of the

case "still resides with the Court of Appeals." (Petitioner's Appendix 0-1). In the extraordinary procedural context of this action, the district court's ruling in this regard was purely jurisdictional and not discretionary, and was probably correct. ACC *does not ask* this Court to review the district court's jurisdictional ruling set forth at Petitioner's Appendix 0-1. Instead, ACC asks this Court to grant certiorari in part because the district court's order of dismissal (Petitioner's Appendix F-1), was entered without first providing ACC an opportunity to join or seek ratification from the entity found by the district court to be the real party in interest as required by Rule 17(a), Federal Rules of Civil Procedure. In addition, ACC has raised the question whether the district court should have made its order of dismissal (Petitioner's appendix F-1) subject to amendment by ACC to show that prerequisites for a derivative action had been met. Neither of these questions involves the district court's denial of ACC's post-dismissal Motion for Relief from Judgment (Petitioner's Appendix M-1).

PETITIONER'S ARGUMENT IN REPLY TO RESPONDENTS' BRIEF

Although ACC does not wish to belabor a precedent so fresh as the opinion in *Holmes vs. SIPC, supra,* a brief review of that case will serve to demonstrate that the *Holmes* opinion supports ACC's Petition for Certiorari.

In *Holmes,* it was alleged that the defendants manipulated sales of securities in violation of the RICO Act, and that the alleged manipulation of securities brought about the insolvency of two securities broker-dealers, First State

Securities Corporation (FSSC), and Joseph Sebag, Inc. (Sebag), As a consequence of these insolvencies, the Securities Investor Protection Corp. (SIPC) was required to pay to the trustees for FSSC and Sebag up to $500,000.00 to secure accounts of each customer of the broker-dealers who had purchased manipulated securities, and up to $100,000.00 to secure accounts of each customer of the broker-dealers who had not purchased manipulated securities. SIPC then claimed it was subrogated to the rights of FSSC and Sebag customers to bring suit for the RICO Act violations that had caused the losses to customer accounts.[1]

This Court ruled that §1964(c) of the RICO Acts calls for application of common law notions of proximate cause. Under this analysis, SIPC could not sue for losses to the accounts of customers who had not purchased manipulated securities. This was because the only harm suffered by *non-purchasers* was loss caused by the insolvency of FSSC and Sebag, which insolvency was in turn allegedly caused by RICO violations. This court ruled that the harm to non-purchasers was too remote from the RICO violations and therefore not proximately caused by the violations.

The Court also noted three points that are of great importance in connection with ACC's Petition for Certiorari, as follows:

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[1] SIPC sued only on the accounts of customers who had NOT purchased manipulated securities. Those customers whose losses flowed from the actual purchase of manipulated securities had filed their own RICO actions.

1. The right of the trustees for FSSC and Sebag to sue under RICO was not questioned (*Holmes vs. SIPC, supra,* FN8);

2. The right of purchasers of manipulated securities to sue under RICO was not questioned (*Holmes vs. SIPC, supra,* FN 18, 19); and

3. Even without purchasing manipulated securities, broker-dealer customers might be proximately injured by the RICO violations if the RICO violations delayed the declaration of insolvency of the broker-dealers, and thereby increased the losses of the broker-dealer customers.

As to the third point concerning delay in the discovery of the broker-dealer's insolvency, Justice Souter's opinion states the following in Footnote 19:

> "We further note that SIPC alleged . . . that . . . Joseph Lugo, an officer of FSSC and one of the alleged conspirators, parked manipulated stocks in the accounts of customers, among them Holmes, who actively participated in the parking transaction involving his account. . . . Lugo "sold" securities owned by FSSC to customers at market price, and "bought" back the same securities some days later at the same price plus interest. Under applicable regulations, a broker-dealer must discount the stock it holds in its own account . . . and the sham transactions allowed FSSC to avoid the discount. But for the parking transactions, FSSC allegedly would have failed capital requirements sooner; would have been shut down by regulators; and would not have dragged Sebag with it in its demise. . . . Thus, their customers

> would have been injured to a lesser extent. . . . *We do not rule out that, if by engaging in the parking transaction, the conspirators committed* [RICO racketeering offenses], *the broker-dealers' customers might be proximately injured by these offenses.* See e.g., *Taffet vs. Southern Co.*, 930 F.2d 847, 856-857 (CA 11, 1991); *County of Suffolk vs. Long Island Lighting Co.*, 907 F.2d 1295, 1311-1312 (CA 2, 1990) . . . " (Emphasis Supplied).

The position of ACC's assignors (depositors and other creditors of Commonwealth Savings Company) is analogous to that of the broker-dealers' customers in *Holmes*. Likewise, Commonwealth Savings Company is in the position of the insolvent broker-dealer in *Holmes*, and Commonwealth Savings Company's Receiver is analogous to the trustees of the insolvent broker-dealers.

ACC's complaint alleges that RICO racketeering offenses of the Respondents caused the following:

1. Direct injury to depositors by concealing the financial instability of a bank, thus inducing persons to make and retain deposits in the bank;

2. Direct injury to depositors by concealing the inadequacy of deposit guaranties, also inducing them to make and retain deposits in an unstable bank;

3. Direct injury to depositors and general creditors of Commonwealth Savings Company by delaying the inevitable demise of Commonwealth Savings Company, and thus increasing the losses of depositors and creditors.

Commonwealth Savings Company depositors who were induced by fraudulent misrepresentations to make and retain deposits in Commonwealth Savings Company are like the customers of FSSC and Sebag in *Holmes vs. SIPC, supra,* who purchased securities and thus, presumably had a right to sue under RICO. Commonwealth Savings Company creditors and depositors who suffered increased losses because RICO violations delayed the closure of Commonwealth Savings Company are like customers of FSSC and Sebag, whose losses were increased because sham "parking" transactions forestalled regulatory closure of the broker-dealers.

Commonwealth Savings Company's Receiver is like the trustees appointed for the insolvent broker-dealers in *Holmes,* who presumably had rights to sue under RICO for direct injuries to their insolvent principals.

If ACC's claims are truly derived from Commonwealth Savings Company as claimed by Respondents, then Commonwealth's Receiver, like the broker-dealers' trustees in *Holmes,* had a claim under the proximate cause analysis of *Holmes,* and ACC should have been allowed to join the Receiver or seek his ratification under Rule 17(a), Federal Rules of Civil Procedure.[2]

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[2] Respondents represent in footnote 40, page 17, of their Brief, that the Nebraska Supreme Court "characterized ACC's claims as relatively worthless", citing *Hamann vs. Marsh,* 237 Neb. 699, 720, 467 N.W.2d 836, 851 (1991). This is a gross misrepresentation of the Nebraska Supreme Court's opinion. In *Hamann,* the court was discussing the constitutionality of a legislative enactment that would have provided state funds to reimburse Commonwealth Savings Company depositors up to

Quite unlike this Court's opinion in *Holmes*, the district court opinion in the case *sub judice* relied upon a particular body of circuit court precedent holding that the RICO Act, like the Clayton Act, allows recovery only to those "directly injured" by prohibited activity. The district court then found injuries to ACC's assignors to be indirect, on the questionable ground that "wrongs committed by a bank's officers and directors that injure all depositors alike create a liability which is an asset of the bank itself." (Petitioner's Appendix G-4).[3]

However, the opinion of this court in *Holmes*, teaches that the courts should depart from mechanistic tests such as the "direct injury vs. indirect injury" analysis used by the district court and the court of appeals to categorize

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$30,000.00 per account as had been ostensibly guarantied by Nebraska Depository Insurance Guaranty Corporation.

This enactment contravened a Nebraska constitutional prohibition against giving or loaning the state's credit to a closed class of citizens, unless the state would receive actual consideration for payments to depositors by statutory assignment of depositors' causes of action.

The Court stated the following:

> "The state could never come close to receiving an equal amount to the proposed distribution of funds by acquiring legal claims against industrial companies [banks] that had gone bankrupt or were in receivership."

It was these potential claims against the insolvent Commonwealth that the Court characterized as "relatively worthless", and NOT the claims ACC asserts against the Respondents.

[3] Acc's Complaint is not limited to allegations of "wrongs committed by bank officers and directors." This questionable analysis is addressed in ACC's Petition for Writ of Certiorari at pp. 4-12.

ACC's complaint. Instead, a RICO complaint should be considered in light of principles of proximate causation.[4]

If the lower courts had applied the proximate cause analysis required by *Holmes vs. SIPC, supra,* rather than the mechanical "direct injury vs. indirect injury" analysis discredited by *Holmes,* the outcome necessarily would have been different. Instead, the district court and the court of appeals have rendered decisions in conflict with *Holmes vs. SIPC, supra.*

CONCLUSION

The Respondents failed to address the requirements of Rule 17(a), Federal Rules of Civil Procedure, and apparently concede this issue. In addition, the lower court opinions contravene the opinion of this Court in *Holmes vs. SIPC, supra.* Accordingly a writ of certiorari should be granted.

Respectfully submitted,

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[4] This Court in *Holmes,* specifically declined to resolve a conflict in the circuit courts about the question whether RICO Act relief for securities fraud is limited to plaintiffs who have purchased or sold a security. "A review of the conflicting cases shows that all could have been resolved on proximate causation grounds. . . . " *Holmes, supra,* 112 S.Ct. at 1322.